

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

**State ex rel. Karl Finney,
Petitioner Below, Petitioner**

vs) **No. 101377** (Mercer County No. 06-C-616-OA)

**Thomas McBride, Warden,
Mount Olive Correctional Facility,
Respondent Below, Respondent**

FILED
April 18, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Karl C. Finney appeals the circuit court's March 15, 2010, order denying his second petition for a writ of post-conviction habeas corpus. The respondent warden filed a summary response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. 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 of First Degree Murder without a recommendation of mercy in 1991. His direct petition for appeal was refused by this Court in 1992. He filed his omnibus petition for habeas corpus in 2000, which the circuit court refused on August 15, 2005. This Court refused a petition for appeal of the habeas order on May 11, 2006.

Petitioner filed this second petition for habeas corpus in 2006, which was amended in 2009. His sole ground asserted is ineffective assistance of his prior habeas counsel. The circuit court found no ineffective assistance of counsel and denied the second habeas petition on March 15, 2010, the order from which petitioner now appeals.

“In 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).

The Court has carefully considered the merits of each of petitioner’s arguments as set forth in his petition for appeal, and it has reviewed the record designated on appeal. Finding no error in the denial of habeas corpus relief, the Court affirms the decision of the circuit court and fully incorporates and adopts, herein, the lower court’s detailed and well-reasoned order. The Clerk of Court is directed to attach a copy of the same hereto.

Affirmed.

ISSUED: April 18, 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

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NOTED CIVIL DOCKET

MAR 15 2010

JULIE BALL
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.*
KARL FINNEY,

V.

CIVIL ACTION NO.: 06-C-616-OA

THOMAS MCBRIDE, Warden
Mount Olive Correctional Facility.

**ORDER DENYING PETITIONER'S
PETITION FOR A WRIT OF HABEAS CORPUS**

On this 8th day of May, 2010, the Court reviewed the above-captioned matter for purposes of rendering a decision on the Petitioner's pending *Amended Petition* (filed on September 2, 2009).

In addition to considering the Court file and pertinent legal authorities, as part of the review process, the Court considered testimonies and arguments set forth during the October 28, 2009 final omnibus evidentiary hearing held in the matter. At said hearing, the Petitioner, Karl Finney, appeared in person and by counsel, Jason Grubb, Esq. George Sitler, Esq., Assistant Prosecuting Attorney, appeared as a representative of the Respondent.

WHEREUPON, after deliberations, the Court does hereby conclude that relief should be **DENIED**. In support of this conclusion, the Court issues the following **FINDINGS of FACT and CONCLUSIONS of LAW**:

I. Findings of Fact

- (1) The Petitioner, Karl Finney, was indicted for the First Degree Murder of Christopher Dillard in February of 1991.
- (2) His case was tried by a Mercer County Jury on May 9, 1991 through May 13, 1991.

At the conclusion of the trial, the jury returned a verdict of guilty of First Degree

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- Murder without a recommendation of mercy.
- (3) The Petitioner was sentenced to life in prison without the possibility of parole.
 - (4) An appeal was filed on the Petitioner's behalf on January 29, 1992. The West Virginia Supreme Court of Appeals subsequently refused to hear the appeal.
 - (5) In August of 2000, the Petitioner filed for habeas corpus relief (Civil Action No. 00-CV-495-S). He was represented by Susan Henderson, Esq. and Thomas Lynn Fuda, Esq. for purposes of the habeas proceeding. His original petition was supplemented and amended on February 16, 2005.
 - (6) The habeas proceeding took place on two days: April 15, 2005, and April 20, 2005.¹
 - (7) In an Order entered on August 18, 2005, the Court denied the Petitioner's petition.
 - (8) Susan Henderson, Esq. then filed a *Petition for Appeal* of the August 18, 2005 *Order Denying Habeas Corpus Relief*.
 - (9) The West Virginia Supreme Court of Appeals refused the *Petition for Appeal*.
 - (10) The current action constitutes the Petitioner's second (2nd) omnibus habeas corpus proceeding, and is premised on the sole ground of ineffective assistance of habeas corpus counsel.

II. Standards Governing Habeas Review

- (1) *West Virginia Code*, § 53-4A-1 *et seq.* "clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding during which he must raise all grounds for relief which are known to him or which he could, with due diligence, discover." Syl. Pt. 1, *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984).

¹ Although held on two separate days, for clarity, unless dates are specified, the two day hearing will be collectively referred to as the 'omnibus habeas corpus hearing.'

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- (2) “A prior omnibus habeas corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: (1) ineffective assistance of counsel at the omnibus habeas corpus hearing; (2) newly discovered evidence; (3) or, a change in the law, favorable to the applicant, which may be applied retroactively.” Syl. Pt. 4, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).²

III. Grounds Raised in Current Petition/Conclusions of Law

- (1) The sole ground raised in the Petitioner’s *Amended Petition* and during the omnibus habeas corpus hearing held on October 28, 2009 was the ground of “ineffective assistance of habeas counsel.”
- (2) The West Virginia Supreme Court of Appeals set forth the standard of review for ineffective assistance of counsel in Syl. Pts. 5 and 6, of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995):

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

² On June 16, 2006, the West Virginia Supreme Court of Appeals held that a fourth (4th) ground for habeas relief may exist in cases involving testimony regarding serology evidence. Summarizing, the Court held as follows:

A prisoner who was convicted between 1979 and 1999 and against whom a West Virginia State Police Crime Serologist, other than a serologist previously found to have engaged in intentional misconduct, offered evidence may bring a petition for a writ of habeas corpus based on the serology evidence even if the prisoner brought a prior habeas corpus challenge to the same serology evidence and the challenge was finally adjudicated.

In re Renewed Investigation of State Police Crime Laboratory, Serology Div., 633 S.E.2d 762, 219 W.Va. 408 (2006).

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the proceedings would have been different. 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.

- (3) Here, during the October 28, 2009 omnibus habeas corpus hearing, the Petitioner claimed that his former habeas counsel, Susan Henderson, Esq.³ was ineffective due to her failure to sufficiently meet with him, and in subpoenaing proper witnesses for his first omnibus habeas corpus proceeding, in Case No.: 00-CV-495-S.
- (4) In addition to the above, in his *Amended Petition*, the Petitioner claims that counsel was ineffective for failure to investigate his claims and for failure to obtain a copy of the court file and transcripts necessary for the filing of an adequate Habeas Corpus Petition.
- (5) After a review of these claims, the Court **FINDS** and **CONCLUDES** that habeas counsel was not ineffective.

Habeas Counsel's Alleged Failure to Sufficiently Meet with the Petitioner

- (6) During the October 28, 2009 omnibus hearing, Susan Henderson, Esq. verified that she had met with the Petitioner on possibly two (2) occasions.
- (7) A review of the record in Civil Action No.: 00-CV-495-S indicates that the Petitioner was present during status hearings prior to the omnibus hearing and/or counsel made representations to the Court that pertinent matters were discussed with the Petitioner.

³ The Court notes that Thomas L. Fuda, Esq. represented Mr. Finney for a time, as co-counsel, when the Petition was pending; however, he went on an extended medical leave of absence, and Susan Henderson, Esq. remained as counsel throughout the remainder of the proceedings and for appeal purposes.

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- (8) Additionally, during the omnibus hearing held on April 15, 2005, in 00-CV-495-S, when the Court specifically asked Mr. Finney if he thought that he and counsel had sufficient time to work on the matter, the Petitioner responded affirmatively.
- (9) Moreover, a review of the Defense Counsel Voucher Information Page, indicates that counsel submitted a claim for fees and expenses in the amount of \$5,871.45 for her representation in the matter. The total fees and costs are comprised of the following out-of-court contacts with the Petitioner:

DATE	CONTACT	TIME SPENT
Apr. 19, 2001	Calls to client	.10 hrs.
Apr. 24, 2001	Reviewed transcript; travel; Conference w/t client; Conference regarding petition	9.0 hrs.
June 6, 2001	Call from client	.10 hrs.
Sept. 17, 2003	Dictation; travel; Conference w/t client	7.0 hrs.
Sept. 24, 2003	Letter from client; dictation	.10 hrs.
Oct. 22, 2003	Travel; conference w/client; Reviewed case	13.0 hrs.
Dec. 16, 2003	Call from client	.20 hrs.
Apr. 30, 2004	Conference w/t judge's secretary; travel; conference w/t client	6.80 hrs.
Dec. 20, 2004	Travel; conference w/t client.	1.30 hrs.

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Aug. 23, 2005	Collect call from client, dictation	.30 hrs.
June 2, 2006	Letter from client, reviewed file, dictation	.10 hrs.

- (10) Records, such as attorney time sheets, routinely made in the regular course of business, at the time of the transaction or occurrence, or within a reasonable time thereafter, are generally trustworthy and reliable. *See State v. Fairchild*, 171 W.Va. 137, 140, 298 S.E.2d 110, 113 (1982).
- (11) Based upon the above contacts, Susan Henderson, Esq.'s testimony, and other communications, including the Petitioner's presence and responses during the statuses and omnibus hearing, the Court **FINDS** and **CONCLUDES** that counsel's performance in terms of contacts and communications were not deficient under an objective standard of reasonableness.

Habeas Counsel's Alleged Failure to Subpoena Proper Witnesses

- (12) During the October 28, 2009 habeas hearing in this matter, the Petitioner argued that Susan Henderson, Esq. was ineffective as habeas counsel due to her failure to subpoena trial counsel for purposes of the first omnibus habeas hearing. The Petitioner alleged that this failure to subpoena witnesses was prejudicial to him and exhibited a lack of adequate preparation on Ms.Henderson's part since he alleged ineffective assistance of trial counsel.
- (13) A review of the omnibus habeas proceeding in Civil Action No.: 00-CV-495-S,

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indicates that the State called Robert Holroyd, Esq. on April 15, 2005, and David Smith, Esq. on April 20, 2005, to provide testimony regarding the claims of ineffective assistance of trial counsel.

- (14) Once the State elicited testimony and rested, both witnesses were then subject to questioning from Susan Henderson, Esq.
- (15) Susan Henderson, Esq., chose not to question Mr. Holroyd due to the fact that Mr. Holroyd testified during the State's direct examination that he did not recall his representation of Mr. Finney and that his memory could not be revived by reviewing documentation.
- (16) Susan Henderson, Esq. then questioned Mr. Smith in detail about his representation of the Petitioner, in terms of his legal strategy and performance.
- (17) David Smith, Esq. testified that the defense was that the Petitioner's brother committed the murder and that "the State's case was largely overwhelming."
- (18) Based upon the above, the Court **FINDS** and **CONCLUDES** that the Petitioner suffered no prejudice/harm from habeas counsel's failure to prepare actual subpoenas for the above two witnesses as they were nevertheless available for testimony.
- (19) The Court further **FINDS** and **CONCLUDES** that based upon the testimony of trial counsel, David Smith, Esq., that there is not a reasonable probability that, but for counsel's omissions/errors, the result of the proceedings would have been different.

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Habeas Counsel's Alleged Failure to Investigate Claims

(20) As a third ground for habeas relief, the Petitioner asserts that habeas counsel was ineffective due to her alleged failure to properly investigate his claims for habeas relief.

(21) In Civil Action No.: 00-CV-495-S, the Petitioner alleged the following grounds for relief:

- (a) The Assistant Prosecuting Attorney committed reversible error by going beyond the scope during the grand jury proceedings.
- (b) The trial court erred in not declaring a mistrial based upon the improper and inflammatory argument of the prosecuting attorney.
- (c) The trial court abused its discretion for failing to strike a juror for cause.
- (d) He was denied effective assistance of counsel.

(22) In terms of the Petitioner's claims of ineffective assistance of trial counsel, the

Petitioner alleged that trial counsel failed to do the following:

- (a) conduct a reasonable investigation of the facts on which the murder was based.
- (b) explore any other defenses.
- (c) conduct any investigation with regard to mitigating evidence as to preclude a recommendation of mercy.
- (d) request any psychological, psychiatric, or competency evaluations.
- (e) properly consult with the Petitioner from the time of appointment through trial.
- (f) properly advise the Petitioner as to his waiver of his preliminary hearing.

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(g) conduct an investigation into the jury panel and its makeup.

(h) engage in plea bargaining prior to trial.

(i) file a Motion for Change of Venue.

(j) adequately inform the Petitioner of his right to testify on his own behalf.

(k) request a complete copy of the transcript of the Petitioner's trial.

(23) In this habeas corpus action, the Petitioner makes a general claim of failure to investigate. At least three of the claims previously before the Court on an earlier habeas review were premised on claims of failure to investigate.

(24) As stated above, the Court, in its August 16, 2005 *Order Denying Habeas Corpus Relief*, while specifically addressing each ground above, found no merit to any of the Petitioner's claims for habeas relief.

(25) Since the Court found no merit to the claims that trial counsel was ineffective for failure to conduct an adequate investigation of the facts upon which the murder was based; for failure to conduct any investigation with regard to mitigating evidence as to preclude a recommendation of mercy; and for failure to conduct an investigation into the jury panel and its makeup, the Court **FINDS** and **CONCLUDES** that there is nothing in the record to indicate that habeas counsel investigated deficiently based upon a reasonable lawyer standard. Under the circumstances, assuming hypothetically that her investigation was deficient in some regard, the Court further

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FINDS and **CONCLUDES** that there is not a reasonable probability that, but for habeas counsel's omissions/errors, the result of the proceedings would have been different.

Habeas Counsel's Alleged Failure to Obtain a Copy of the Court File and Transcripts

- (26) Lastly, the Petitioner argues that habeas counsel was ineffective for her alleged failure to obtain a copy of the Court File and the Transcripts.
- (27) This ground was previously ruled upon in terms of ineffective assistance of trial counsel in Civil Action No.: 00-CV-495-S. *See reference above.*
- (28) In the August 16, 2005 *Order Denying Habeas Corpus Relief*, the Court specifically found as follows:

The Court's review of the record indicates that Mr. Smith filed an appeal on the Petitioner's behalf on January 29, 1992. At the Petitioner's evidentiary hearing, Mr. Smith testified that as the one who actually filed the appeal, he would have noticed if the transcript was missing, thus implying it was not. In addition, the Court located a letter dated November 27, 1991, addressed to the Petitioner from the Clerk of the Circuit Court Wilma F. Grubb. The contents of this letter indicate that the Petitioner was sent "a copy of ...criminal court file and transcripts of all court proceedings." Court File at 117.

Throughout this petition for appeal, Mr. Smith cites frequently to specific testimony during the trial. See e.g. Petition for Appeal at 4-5, 7-8, 10-12, and 13-17. Thus, from the numerous citations to actual verbatim trial record testimony, it seems highly probable that Mr. Smith did actually possess a trial transcript sufficient to allow him to perfect his appeal on the Petitioner's behalf. Thus, it appears to the Court that Petitioner's appeal was sought by a competent and experienced attorney and such copies of relevant portions of the transcript were provided to the Supreme Court of Appeals for Petitioner's original appeal. Therefore, a proper appeal was effectuated with all necessary court records, as the Petitioner was able to cite transcripts for the alleged errors committed by the trial court. Ultimately, the Court cannot determine that Petitioner's trial counsel did not secure the necessary records, including trial transcripts, for which to perfect his appeal. The Petitioner questioned the grand jury presentation, the jury selection process and the state's closing argument. He has cited transcripts which allowed the Court to

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review these allegations. Therefore, his argument is without merit. For all these reasons, this ground must also fail.

(29) Here, a review of the *Addendum to and Amendment of Petition for Writ of Habeas*

Corpus, filed by Susan Henderson, Esq., on February 26, 2005, states as follows:

It is unclear from the transcript as it has been transcribed just what may have been omitted. Petitioner has attempted to have the original Court Reporter notes reviewed in order to have a complete transcript of all proceedings. However, Petitioner has been advised that the notes are damaged such that no further transcriptions are possible.

(30) The trial court is not required to furnish a complete transcript, but only that part

sufficient to permit proper consideration of the Petitioner's claims. *See Mayer v.*

City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed. 2d 372 (1971); *Call v.*

McKenzie, 220 S.E.2d 665 (1975); *State ex rel. Banach v. Boles*, 147 W.Va. 850,

131 S.E.2d 722 (1963).

(31) Based upon the above legal authority and a review of the presentation of the

Petitioner's claims in Civil Action No.: 00-CV-495-S, the Court **FINDS** and

CONCLUDES that there is nothing in the record to indicate that habeas

Counsel's performance or the Petition which was filed on the Petitioner's

behalf was deficient based upon a reasonable lawyer standard, under these

circumstances.

IV. Ruling

WHEREFORE, it is hereby **ORDERED, ADJUDGED, and DECREED** by this

Court that the Petitioner's *Petition for a Writ of Habeas Corpus* is **DENIED**.

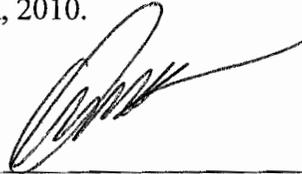
The Clerk is directed to seal the exhibits in the underlying criminal matter (Case No.: 91-F-20) and forward a copy of this Order to the Petitioner at the Mount Olive

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Correctional Complex; to Jason Grubb, Esq., Counsel for the Petitioner; and to the Mercer County Assistant Prosecuting Attorney, George Sitler, Esq.

This matter, having accomplished the purpose for which it was instituted, it is hereby ordered **DISMISSED** and **OMITTED** from the docket of this Court.

ENTERED this the 15th day of March, 2010.



OMAR J. ABOULHOSN, JUDGE
9th Judicial Circuit of Mercer County