

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

**David S. Branham,
Petitioner Below, Petitioner**

vs.) **No. 11-0706** (Kanawha County 11-MISC-76)

**Adrian Hoke, Warden, Huttonsville Correctional
Center, Respondent Below, Respondent**

FILED

July 3, 2012

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

MEMORANDUM DECISION

Petitioner David S. Branham, pro se, appeals the March 25, 2011, order of the Circuit Court of Kanawha County summarily denying his fifth petition for a writ of habeas corpus. The respondent warden, by Barbara H. Allen, his attorney, filed a response.

The Court has considered the parties' briefs and the record on appeal. 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 that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

At the time of the underlying crime in 1990, petitioner was on parole for murder and robbery. When petitioner and his wife were hitchhiking through the area, the victim picked them up and took them to his residence. Evidently, there was an arrangement for the victim to receive sexual favors from petitioner's wife. A fight broke out for some uncertain reason. Petitioner stabbed the victim, and robbed him of jewelry and his vehicle.

Petitioner was twenty-nine when the trial court sentenced him to 100 years for aggravated robbery, two to ten years for malicious wounding, and one to ten years for grand larceny by an order entered on September 30, 1994. On March 7, 1995, this Court refused petitioner's direct appeal.

Subsequently, petitioner filed his first petition for a writ of habeas corpus, the denial of which he appealed on November 19, 1997. This Court refused the appeal by an order entered on July 20, 1998.

Petitioner filed his third habeas petition on April 7, 2006.¹ The circuit court subsequently

¹ Petitioner's fifth habeas petition indicates that a second habeas petition was filed in between the first and third petitions. According to petitioner, this second petition was summarily denied.

entered three separate orders. In the first order, entered on March 7, 2007, the circuit court summarily found: (1) petitioner's sentence was not disproportionate to his crime because "actual violence coupled with a history of violence justifies a 100 year sentence"; (2) the plea agreement was not breached because "[t]he transcript of the guilty plea . . . shows that the sentencing Judge informed the Petitioner that he could receive any sentence above ten years on the aggravated robbery charge, including a 300 year sentence"; and (3) petitioner was mentally competent at his plea hearing. With regard to petitioner's allegation that trial counsel was ineffective, the circuit court appointed habeas counsel and scheduled a hearing.

After an August 10, 2007, hearing on the claim of ineffective assistance of counsel, the circuit court entered its second order on August 28, 2007. The court made the following pertinent findings of fact:

- 6) The Petitioner indicated to the Court that he understood that he did not have to follow the recommendation(s) of his counsel relative to pleading guilty, and that the decision was his to make [citation omitted].
- 7) The Petitioner was not advised during the plea hearing that he could not withdraw his guilty plea(s) once entered.
- 8) During his testimony at the habeas hearing, when asked why he did not ask to withdraw his guilty plea(s) when he received the sentence of one hundred (100) years, the Petitioner indicated that he did not think that he could do so.
- 9) During the habeas hearing, the Petitioner testified that his lawyer made no promises or guarantees regarding sentencing.
- 10) Mark Mangano, Petitioner's counsel during the plea and sentencing hearings, testified that although he had no specific recall of [petitioner]'s case, he would have graduated from law school approximately five (5) years prior to handling Petitioner's case and had handled thirty (30) to forty (40) cases prior to that one.
- 11) Mark Mangano testified that although he had no specific recall of the Petitioner's case, it was not his practice to tell defendant's [sic] that they would receive a specific sentence.
- 12) The trial Court explained the minimum sentencing structure to the Petitioner if the Court decided to follow the State's recommendation, and at the same time, explained to the Petitioner that he could receive a life sentence.

In light of its findings, the circuit court made the following pertinent conclusions:

5) The Court concludes that the Petitioner has failed to establish ineffective assistance of counsel. Specifically, the Court finds the Petitioner has failed to establish any deficiency in his counsel's representation, having testified that his counsel made no promises or guarantees with respect to sentencing.

* * *

7) The Court concludes that no constitutional or jurisdictional error exists as a result of the trial Court's colloquy with the Petitioner during the plea hearing, and further concludes that the Petitioner has failed to show that he was unaware of the consequences of his plea of guilty. Specifically, given the record and the testimony of the Petitioner, the Court finds that he was aware of the potential sentence(s) and had the understanding that he could not withdraw his guilty plea.

Accordingly, the circuit court denied habeas relief. In its third order, entered on October 31, 2007, the circuit court consolidated its previous two orders for the purpose of appeal. This Court refused petitioner's appeal from the denial of his third habeas petition on June 17, 2008.

Petitioner filed his fourth habeas petition on May 24, 2010, which the circuit court summarily denied on July 26, 2010. Petitioner filed his fifth habeas petition on February 9, 2011. The circuit court summarily denied petitioner's fifth petition on March 25, 2011, for the following reasons:

The Court may refuse a habeas petition if it is satisfied that the petitioner is entitled to no relief after the court reviews the petition, the documentary evidence, the record of the underlying conviction, as well as the record of any other prior petitions. W.Va. Code § 53-4A-3(a). Furthermore, the Court "shall prepare and enter an order for summary dismissal of the petition if the contentions in fact or law relied upon in the petition have been previously and finally adjudicated or waived." W.Va. R. Hab. Corpus. 4(c). This Court finds and concludes that all the grounds raised by [petitioner] in the present Petition have previously and finally adjudicated in his previous habeas petition, in Civil Action No. 06-MISC-157. The Court further finds and concludes that any such grounds not previously raised in [petitioner]'s [third] habeas petition (Civil Action No. 06-MISC-157) have been waived. *See Losh v. McKenzie*, [166 W.Va. 762], 277 S.E.2d 606 (1981).

The standard for this Court's review of the circuit court's order summarily denying petitioner's fifth petition is set forth in Syllabus Point One, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006):

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.

On appeal, petitioner argues he should be allowed to continue with his fifth habeas proceeding because his counsel in the third proceeding was ineffective in that counsel did not provide him with a *Losh* checklist of potential habeas grounds and did not raise all the issues petitioner wanted him to raise. The respondent warden argues that any error with respect to the formalities of *Losh*, *supra*, would constitute harmless error because petitioner entered a fully counseled guilty plea and, therefore, the only issues he could raise in subsequent proceedings were issues relating to the circuit court's jurisdiction and his sentence. The respondent warden asserts that while petitioner alleges that certain issues were previously dismissed without any evidence or legal analysis, those issues were based on the record and the circuit court properly considered relevant portions of the record when denying petitioner's third petition. (The circuit court provided petitioner with an evidentiary hearing on the one issue on which a hearing was required.) The respondent warden argues that with the filing of petitioner's fifth petition, it can be fairly said that he is "abusing the writ." After careful consideration of the parties' arguments, this Court concludes that the circuit court did not abuse its discretion in summarily denying petitioner's fifth habeas petition.

For the foregoing reasons, we find no error in the decision of the circuit court and its March 25, 2011, order summarily denying petitioner's petition for a writ of habeas corpus is affirmed.

Affirmed.

ISSUED: July 3, 2012

CONCURRED IN BY:

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

NOT PARTICIPATING:

Justice Brent D. Benjamin