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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Curtis R.
Petitioner Below, Petitioner

vs.) No. 20-0533 (Wood County 16-P-72)

Karen Pszczolkowski, Superintendent,
Northern Correctional Center,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Curtis R., by counsel Matthew Brummond, appeals the Circuit Court of Wood County's June 18, 2020, order denying his petition for a writ of habeas corpus.[1] Respondent Karen Pszczolkowski, Superintendent, Northern Correctional Facility, by counsel Patrick Morrisey and William E. Longwell, filed a response in support of the circuit court's order to which petitioner submitted a reply.

This 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 Rules of Appellate Procedure.

In 2014, petitioner began dating K.D., who had a two-year-old and one-year-old child from a previous relationship. K.D. then became pregnant with petitioner's child. While under petitioner's care, the one-year-old girl suffered injuries and stopped breathing. Petitioner contacted 9-1-1 and attempted to perform CPR on the child. However, the child passed away at the hospital. After giving a statement at the police station, petitioner took $1,800 from the restaurant where he worked and fled to Mexico. He was later apprehended and extradited back to West Virginia.

In September of 2014, petitioner was indicted by a grand jury for (1) murder of a child by a guardian or custodian; (2) death of a child by a guardian or custodian; (3) murder; (4) grand

[1] Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

larceny; and (5) petit larceny. Petitioner was arraigned and originally pled not guilty to all charges. The circuit court appointed A. Joseph Munoz to represent petitioner and later appointed Travis C. Sayre as co-counsel. On October 16, 2015, petitioner entered pleas of guilty to first-degree murder and grand larceny. During the plea hearing, the circuit court conducted a colloquy with petitioner, and the court determined that petitioner understood the offenses to which he was pleading guilty, including the minimum and maximum penalties; his right to plead not guilty and receive a speedy trial; and that his guilty plea would operate as a waiver of his right to a trial by jury. During that hearing, petitioner confirmed that his plea was voluntary and not the result of any threats or promises outside of the plea agreement itself. On December 16, 2015, petitioner was sentenced to a penitentiary sentence of life with eligibility for parole after serving fifteen years for first-degree murder and to an indeterminate penitentiary sentence of one to ten years for grand larceny, with the sentences to run consecutively. Petitioner did not appeal that conviction or sentence.

Acting as a self-represented litigant, petitioner filed a petition for a writ of habeas corpus with the circuit court in May of 2016. Following the appointment of counsel, petitioner filed his amended petition for writ of habeas corpus on January 18, 2017, alleging ineffective assistance of trial counsel in their investigation; ineffective assistance of trial counsel in negotiating the plea and advising petitioner of the probability of ultimately receiving parole; and ineffective assistance of trial counsel in developing the case as to the medical evidence. The circuit court held an omnibus evidentiary hearing on the amended petition on April 20, 2018, during which petitioner was represented by Joseph W. McFarland. The court heard testimony from petitioner's trial counsel and petitioner, and it took judicial notice of the court file in the underlying criminal case, Case No. 14-F-276.

By order entered on February 19, 2020, the habeas court denied petitioner's request for habeas relief. According to the habeas court, petitioner argued that trial counsel insisted upon a trial strategy that would implicate K.D. in the death of the one-year-old victim. At the habeas stage, petitioner argued that because he

> was unwilling to pursue that strategy, he . . . was coerced into entering a guilty plea in order to avoid putting [K.D.] in a negative light. This point of error and the manner in which it was presented at the [e]videntiary [h]earing also suggest that [p]etitioner alleged ineffective assistance of counsel as an alternative theory of relief under this set of allegations.

The habeas court found that Mr. Munoz consulted with Dr. Bill Ralston, an assistant medical examiner in Ohio, with regard to petitioner's underlying case. In addition, Mr. Sayre consulted with Dr. Andrew Baker, a forensic pathologist in Minnesota. The court found that petitioner's trial attorneys discussed the experts' findings with one another and petitioner. Regarding the consultations, the court found

> that each expert declined to prepare and submit any written report of their findings at the express request of [p]etitioner's counsel. This decision was made because each expert had opined that not only did the State's expert make correct findings in the context of the minor victim's autopsy and the minor victim's cause of death, but each expert believed that their respective opinions would be even less favorable

> to [p]etitioner than that of the State's expert. . . . Therefore, the [c]ourt concludes that [p]etitioner's trial counsel [] were not objectively deficient under the first part of the

Strickland/Miller test.[2] The court further found that "each counsel made the sound decision of ensuring that the less-than-favorable opinions of Dr. Baker and Dr. Ralston could not be presented at trial by the State."

With regard to petitioner's argument raised for the first time during the evidentiary hearing, but not waived on the *Losh* checklist so still cognizable in that proceeding, was that his guilty plea was involuntary due to a defense theory implicating K.D. forced upon him by counsel. The habeas court found, based upon the plea colloquy, that petitioner understood his rights and the fact that his guilty plea waived his right to a jury trial; that he was satisfied with the services of his attorneys; and that petitioner affirmed at the end of the plea hearing that he had truthfully and fully answered all of the questions the court posed. In addressing the claim, the habeas court found that "[a] decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so 'ill chosen that it permeates the entire trial with obvious unfairness.'" *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 328, 465 S.E.2d 416, 430 (1995). It also noted that this Court "will not use hindsight and second-guessing of *Counsel's* decisions to elevate a possible mistake into an error of constitutional proportion." *Jenkins v. Ballard*, No. 15-0454, 2016 WL 1455611, *25 (W. Va. Apr. 12, 2016) (memorandum decision) (citing Syl. Pt. 4, *Legursky* and *State ex rel. Edgell v. Painter*, 206 W. Va. 168, 172, 522 S.E.2d 636, 640 (1999)). Based upon those cases, the habeas court determined that

> the law of this State is clear that trial tactics are firmly within the discretion of trial counsel. [] The [c]ourt further finds that no other evidence of any alternative strategy was presented by [p]etitioner let alone that any alternative was available to trial counsel prior to his guilty plea. [] It is therefore clear, and this [c]ourt consequently concludes, that [p]etitioner[']s trial counsel was not ineffective in their choice of a defense strategy. Given the opinions of both Dr. Ralston and Dr. Baker, in conjunction with the State's expected evidence on the issue, attacking the cause of death of the minor victim was not a reasonable alternative. However, it was indicated on the record that [K.D.] was alone with the child for significant periods of time preceding the child's death. . . . Therefore, the decision to pursue this strategy, especially given the alternatives available from the record, does not satisfy either prong of the *Strickland/Miller* test.

The habeas court went on to find that petitioner's guilty pleas were voluntary and intelligent and that his trial counsel did not coerce or corral him into entering such pleas. According to the court, the only evidence to support petitioner's claim is his self-serving statements made during the evidentiary hearing, though those "statements are belied by [p]etitioner's own representations to the [c]ourt, under oath, at the change of plea hearing . . . ."

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[2] *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Thereafter, on June 18, 2020, petitioner and the State jointly submitted an agreed order on petitioner's motion to redispose the amended petition for writ of habeas corpus, to allow petitioner to pursue an appeal, which the circuit court approved and entered. Upon review and consideration of evidence presented during the April 20, 2018, omnibus evidentiary hearing and the entire record, the circuit court signed its June 18, 2020, order reaching the same findings as the February 19, 2020, order. With regard to the single assignment of error in the instant appeal, after setting forth the same reasoning, the habeas court concluded that petitioner's trial counsel were not ineffective in their choice of defense strategy, again pointing to the consultations with experts and the fact that K.D. was alone with the child. It, therefore, found that petitioner's counsels' decision to pursue that strategy did not satisfy either prong of the *Strickland/Miller* test, so petitioner could not justify relief in habeas corpus on the ineffective assistance of counsel claim. It further found that the guilty pleas were voluntary and intelligent and that petitioner's trial counsel did not coerce or corral him into entering the pleas. The circuit court again found that the only evidence to support petitioner's claim were his self-serving statements made during the evidentiary hearing, which were belied by petitioner's representations to the court, under oath, at the change of plea hearing. The court again denied petitioner's requested relief. Petitioner appeals the June 18, 2020, order.

This Court reviews a circuit court order denying a habeas petition under the following standard:

> "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).

Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

On appeal, petitioner sets forth a single assignment of error: In petitioner's prosecution for the death of K.D.'s child, his counsel planned a trial strategy that petitioner feared would incriminate K.D. and endanger her other children. Petitioner questions whether the habeas court erred in ruling that his guilty plea was voluntary when, he claims, he would not have pleaded guilty had counsel respected his wishes concerning the ends of representation. In support of petitioner's argument that his guilty plea was involuntary because his counsel insisted on investigating a theory of defense that contravened his stated goals for the representation, petitioner asserts that regardless of whether petitioner's counsel had settled on a strategy to blame K.D. or was simply considering it, the implicit threat that counsel could contravene petitioner's goals coerced the guilty plea. He further argues that the habeas court erred as a matter of law by finding that counsel had an absolute right to determine trial strategy. Petitioner contends that while the habeas court applied the correct legal standard, it reached the wrong conclusion, as a plea cannot "represent a voluntary and intelligent choice among the alternative courses of action open to the defendant" if counsel has misled the defendant about the alternative courses of action.

According to petitioner, despite the court's factual findings, trial counsels' testimony alone suffices to show that the plea was not knowing or intelligent. Petitioner asserts that he "pleaded

guilty in part because it was the only definitive way to achieve his goals" of protecting K.D. and her children. He further contends that "[r]egardless of whether this was explicit coercion or stemmed from the same mistake of law that the court made, counsel[s'] unwillingness to abandon the possibility of blaming [K.D.] represented an extrinsic factor impugning the knowing and intelligent character necessary for a voluntary guilty plea." Finally, petitioner contends that he would not have pleaded guilty if his trial counsel had respected his autonomous role within the attorney-client relationship. Petitioner asserts that even if counsel had not made a final decision on strategy, the mere possibility that they might blame K.D. irrespective of his wishes meant that pleading guilty was his only way to ensure his lawyers would not incriminate K.D., potentially leaving his child without a mother. Thus, he contends that the plea was not a voluntary and intelligent choice among the alternative courses of action open to petitioner.

As we have found,

> the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another. This result is no accident, but instead flows from deliberate policy decisions this Court and the United States Supreme Court have made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential" and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance[.]" *Strickland [v. Washington*], 466 U.S. [668,] 689-90, 104 S.Ct. [2052,] 2065-66, 80 L.Ed.2d [674,] 694–95 [(1984)]. In other words, we always should presume strongly that counsel's performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a "wide range." The test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

Miller, 194 W. Va. at 16, 459 S.E.2d at 127.

> "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland* . . . : (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 5, *State v. Miller*[.]

Syl. Pt. 3, *State ex rel. Vernatter v. Warden, W. Virginia Penitentiary*, 207 W. Va. 11, 528 S.E.2d 207 (1999).

> In reviewing [*Strickland's* first prong,] 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.

Miller, 194 W. Va. at 6-7, 459 S.E.2d at 117-18, Syl. Pt. 6. In reviewing the second prong, prejudice, the court looks at whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."" *Vernatter*, 207 W. Va. at 13, 528 S.E.2d at 209, Syl. Pt. 3, in part (quoting *Miller*, 194 W. Va. at 6, 459 S.E.2d at 117, Syl. Pt. 5, in part). Finally, "[i]n cases involving a criminal conviction based upon a guilty plea, the prejudice requirement of the two-part test established by *Strickland* . . . and . . . *Miller* . . . demands that a habeas petitioner show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Vernatter*, 207 W. Va. at 14, 528 S.E.2d at 210, Syl. Pt. 6.

Because petitioner argues that his plea was involuntary, we must also consider our prior holdings set forth in Syllabus Points 2 and 3 of *State v. Sims*, 162 W. Va. 212, 248 S.E.2d 834 (1978):

> 2. The controlling test as to the voluntariness of a guilty plea, when it is attacked either on a direct appeal or in a habeas corpus proceeding on grounds that fall within those on which counsel might reasonably be expected to advise, is the competency of the advice given by counsel.
>
> 3. Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial; (3) the guilty plea must have been motivated by this error.

Expanding upon the first part of the *Strickland/Miller* test, "[i]n 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." *Miller*, 194 W. Va. at 6, 459 S.E.2d at 117, Syl. Pt. 6, in part. "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). This Court noted in *Miller* that

> [w]hat defense to carry to the jury, what witnesses to call, and what method of presentation to use is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess. Obviously, lawyers always can disagree as to what defense is worthy of pursuing "such is the stuff out of which trials are made."

194 W. Va. at 16, 459 S.E.2d 127; *see also Legursky*, 195 W. Va. at 328, 465 S.E.2d at 430. Habeas counsel "with luxury of time and the opportunity to focus resources on specific facts of a made record, inevitably will identify shortcomings in the performance of prior counsel." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

It is important to note that petitioner does not claim that the trial court's plea colloquy was deficient. In our seminal case on whether a guilty plea was given voluntarily and knowingly, we found:

> Where there is a transcript of the colloquy which occurred between the court and the accused before the acceptance of the plea of guilty, and where that transcript conclusively demonstrates that there was a knowing and intelligent waiver of those rights necessarily surrendered as a result of a guilty plea, the issue is [r]es judicata in a subsequent action in [h]abeas corpus and the petition for Habeas corpus may be summarily dismissed without an evidentiary hearing.
>
> A defendant may knowingly and intelligently waive constitutional rights . . . . The most common issues in [h]abeas corpus cases are whether there were, indeed, knowing and intelligent waivers, whether there were facts outside the record which improperly caused the defendant to enter his plea, and whether defendant's counsel was indeed competent. These major issues can all be finally resolved in the careful taking of the original plea.

Call v. McKenzie, 159 W. Va. 191, 195-96, 220 S.E.2d 665, 669-70 (1975) (footnote omitted). We find that the circuit court complied with the mandates of *Call* in conducting petitioner's plea colloquy.

At the outset, the circuit court walked petitioner through each crime with which he was charged, and petitioner provided the potential sentences for each charge, demonstrating a clear understanding of the same, including the difference between concurrent and consecutive sentences. Petitioner informed the circuit court that he had gone over all the terms and conditions of the plea agreement; that he was entering into the agreement voluntarily and of his own free will; and that no one had pressured him to enter into the agreement. In addition, the circuit court asked petitioner to complete "Defendant's Statement in Support of a Plea of Guilty." His attorneys confirmed that they had gone over the constitutional rights he would be waiving if he chose to plead guilty. Under oath, petitioner again informed the court that he was pleading guilty of his own free will and believed that he was guilty of the crimes to which he wished to plead guilty. The colloquy continued with the following:

> COURT: And you've discussed with your attorneys every fact or circumstance which would have any bearing upon your guilt or innocence, that is you've told your lawyers everything you know about this case?
>
> PETITIONER: Yes, Your Honor.

THE STATE: Your Honor, one question for [petitioner]. As he was giving his factual basis, I don't believe he indicated that it was done premeditatedly and believe that that would be something that we would like him to acknowledge on the record.

PETITIONER: Yes, Your Honor. I did admit it was intentional. Yes.

THE STATE: And premeditated?

PETITIONER: Yes.

. . . .

COURT: Are you satisfied with the services of your attorney[s] . . . in this case?

PETITIONER: Yes, sir.

COURT: Is there anything [they have] done which you felt [they] should not have done?

PETITIONER: No, Your Honor.

COURT: With either one[?]

PETITIONER: No, sir.

COURT: Is there anything that they haven't done that you felt they should have?

PETITIONER: No, Your Honor.

In support of his argument, petitioner points out that "[t]he fact that a defendant, in open court, at the time of the entry of a plea, stated that it was not coerced or unduly influenced by promises, although evidential on the issue, does not foreclose inquiry as to its voluntariness." Syl. Pt. 4, *State ex rel. Clancy v. Coiner*, 154 W. Va. 857, 179 S.E.2d 726 (1971). However, we have also held that "'"[t]he burden of proving that a plea was involuntarily made rests upon the pleader." Syllabus point 3, *State ex rel. Clancy v. Coiner*, 154 W. Va. 857, 179 S.E.2d 726 (1971).' Syllabus Point 1, *State ex rel. Wilson v. Hedrick*, 180 W.Va. 689, 379 S.E.2d 493 (1989)." Syl. Pt. 4, *Duncil v. Kaufman*, 183 W. Va. 175, 394 S.E.2d 870 (1990). Here, while petitioner may not have agreed with counsels' proposed strategy, as the circuit court found, he failed to present any other proposed theory of defense. During the omnibus evidentiary hearing, Mr. Munoz explained that both he and Mr. Sayre either "investigated or wanted to potentially pursue" a defense implicating K.D. in the murder. However, Mr. Munoz cautioned that such a defense was never formally agreed upon; instead, they engaged in formulating potential strategies. Respondent argues that petitioner's self-serving testimony in the habeas proceeding is questionable, at best, considering that during the plea hearing petitioner informed the trial court that he was satisfied with his counsels' efforts, that they did everything he wanted them to do, that they did not do

anything he did not want them to do, and that he was guilty of murdering the victim. Considering the plea colloquy, the lack of an alternative theory of defense, the briefs, and the record before this Court, we find that the circuit court did not err in determining that petitioner's pleas were voluntarily and intelligently entered by petitioner and in denying his petition for a writ of habeas corpus based upon his assistance of counsel.

Affirmed.

ISSUED: January 12, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice William R. Wooton