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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Roy Roger Pittman,
Plaintiff Below, Petitioner

vs.) No. 21-0006 (Kanawha County 19-P-362)

Shelby Searls, Superintendent,
Huttonsville Correctional Center,
Defendant Below, Respondent

MEMORANDUM DECISION

Petitioner Roy Roger Pittman, by counsel Timothy J. LaFon and Keisha D. May, appeals the Circuit Court of Kanawha County's December 9, 2020, order denying his petition for a writ of habeas corpus. Respondent Shelby Searls, Superintendent, Huttonsville Correctional Center, by counsel Patrick Morrisey and Andrea Nease Proper, 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.

On May 24, 2013, petitioner murdered his fifteen-year-old daughter, Brittany, by shooting her in the chest. His wife called 9-1-1 and reported that petitioner had shot their daughter in the chest. Petitioner then walked to another house and shot his twelve-year-old son, Matthew, in the leg and groin area. After police arrived, petitioner turned the gun on himself, shooting himself in the head. However, both petitioner and Matthew survived. When police asked petitioner why he shot the children, he responded, "[T]hey needed shot." Other children in the home witnessed events leading up to the shootings and/or the shootings themselves, including petitioner telling his wife that she needed to get the children or he was going to kill them. The autopsy report for Brittany indicated that she had been shot in the chest from a distance of three feet or less.

After petitioner was released from the hospital, he was arrested and later indicted by the grand jury for the first-degree murder of Brittany, attempted murder of Matthew, and malicious wounding of Matthew. Dr. Bobby Miller examined petitioner several times before issuing an October 17, 2013, letter to petitioner's trial counsel indicating that petitioner "likely possesses a

neurological diagnosis, pertinent to his competency and/or criminal responsibility" and requested medical tests of petitioner's brain. On November 4, 2013, petitioner requested a forensic examination to determine his competency and criminal responsibility, asserting that petitioner had exhibited signs of cognitive impairment. He also requested the same medical tests of the brain requested by Dr. Miller. The court granted the motion and ordered a general forensic examination by Dr. Miller.

Thereafter, Dr. Miller issued his April 14, 2014, report, finding that petitioner "**does** exhibit a rational, as well as factual, understanding of the proceedings against him and **does** exhibit a sufficient present ability to consult with his attorney with a reasonable degree of understanding." It further found that "at the time of the alleged offense [petitioner] **did not lack** substantial capacity to appreciate the wrongfulness of his actions and **did not lack** substantial capacity to conform his conduct to the requirements of the law." Dr. Miller determined that, although petitioner claimed he could not appreciate the wrongfulness of his actions at the time of the shootings, the evidence showed that petitioner did not have a disorder or mental state that prevented him from knowing that his behavior was criminal and that his attempted suicide showed his ability to recognize the wrongfulness of his actions. Dr. Miller also found that petitioner had early dementia at the time of the offense, due to heavy drinking, and, at the time of the examination, had "mild neurocognitive disorder." Prior to the shootings, petitioner had not received mental health treatment. Further, Dr. Miller found that petitioner's "neuropsychological function has actually improved" since his initial evaluation in September of 2013. He also noted that while petitioner claimed amnesia from two days prior to the shootings until five weeks after, petitioner made several statements to Dr. Miller to the contrary. Ultimately, Dr. Miller found that petitioner was competent to stand trial and "was criminally responsible at the time of the offense." However, he also determined that at the time of the offense, petitioner had impaired decision-making ability based upon a combination of factors, including neuropsychological dysfunction relating to his alcohol abuse; high ammonia levels due to liver failure that may have resulted in mental status changes; white matter damage in his brain; intoxication; deteriorating behavior, including threats and unpredictability; and family fighting, which caused petitioner to be angry. Dr. Miller found that petitioner had "diminished powers of judgment."

The State then moved to have petitioner evaluated to determine whether he suffered from diminished capacity. The circuit court granted that motion, and Dr. Ralph Smith was ordered to examine petitioner and produce a report. According to Dr. Smith's August 11, 2014, report, he found that petitioner functioned in the low average range of intelligence but that testing did not support memory or concentration deficits and he had only mild deficits in higher cognitive skills. Dr. Smith diagnosed petitioner with substance abuse disorder and a personality disorder "evidenced by his repeated threats, often with displays of weapons, stress intolerance, and findings on the Personality Assessment Inventory." He ultimately determined that petitioner was competent to stand trial and that he possessed the "adequate factual and rational appreciation of the proceedings against him and [] the capacity to assist his attorney in his own defense." Dr. Smith further found that petitioner's "psychiatric problems did not meet the criteria for diminished capacity at the time of the alleged offenses" and that he had "made threats to kill the victims previously, as well as the day of the shooting, thus showing premeditation." In addition, Dr. Smith found that petitioner's Glasgow coma score after shooting himself in the face was fourteen out of fifteen, which reportedly showed that petitioner was cognizant at the time the crimes occurred,

even after shooting himself.

In April of 2015, the State made a written plea offer to petitioner whereby he would plead guilty to second-degree murder with the use of a firearm and attempted second-degree murder with the use of a firearm. Petitioner executed a "statement in support of guilty plea" and a written plea of guilty, and that plea was accepted by the circuit court during a hearing on April 16, 2015, and by order entered on that date. During the plea hearing, petitioner testified that he understood what rights he was waiving by entering the plea, he understood the penalty he could receive, he understood that both psychiatrists had found him competent to stand trial, he understood the crimes with which he was charged and the ones to which he was pleading guilty, he understood the penalties for the offenses, and he acknowledged that his mind was clear so he understood everything the court was saying. In addition, his attorneys confirmed that petitioner knew the elements of the offenses and the penalties.

On June 3, 2015, Dr. Miller issued a second report following a re-evaluation on May 29, 2015. In that report, he concluded that petitioner was not likely to engage in future violent behavior. He also found that petitioner suffered from "a very mild level of emotional distress characterized by depression and an even milder level of anxiety." Dr. Miller characterized petitioner's thoughts as "clear and organized," his judgment as intact, and his attention and concentration as adequate. Additionally, Dr. Miller found that petitioner had a full recovery of any prior neuropsychological deficits.

Petitioner filed a memorandum in support of his request for concurrent sentencing and for home confinement, and during the June 8, 2015, sentencing hearing, he requested the minimum statutory sentence. While petitioner cited his family's support and understanding, arguing that he is not a risk to reoffend and pointing to his lack of prior criminal history, the State mentioned that it entered into the plea agreement based upon the family's sentiment but that the facts supported first-degree murder. The State also noted that the family seemed to believe that petitioner could return home to live with them, but his parental rights had been terminated so that was impossible. The State argued that the severity and circumstances of the crimes required the imposition of the maximum sentences to run consecutively. By order entered on June 12, 2015, the circuit court sentenced petitioner to a determinate sentence of twenty years for second-degree murder and one to three years for attempted second-degree murder, said sentences to run consecutively.

On January 31, 2020, petitioner, acting as a self-represented litigant, filed a petition for a writ of habeas corpus and a *Losh* list, arguing that he received ineffective assistance of counsel because his counsel did not recognize his incapacity and lack of criminal responsibility at the time of the crimes. He also asserted that his "inability to make cognitive decisions due to his medical and psychological conditions was apparent and his lack of potential understanding was obvious to all that interacted with him." According to the petition, it was not in his best interest to enter into the plea agreement. He further asserted that his plea was involuntary because he had undue influence and "was by no means capable of rationally considering the plea and the possible outcome of the plea offer, all of which should have been recognized by his counsel at the time."

The circuit court entered its order denying the petition for a writ of habeas corpus on December 9, 2020, without conducting a hearing. In that order, the circuit court went through the

facts and evidence of the crime before concluding that petitioner waived the issue of diminished capacity by entering a fully counseled, voluntary, knowing, and intelligent guilty plea so he had waived all non-jurisdictional defects in his criminal proceeding. It further found that petitioner did not meet the criteria for proffering the partial defense of diminished capacity but that he waived that defense by pleading guilty. With regard to the ineffective assistance of counsel claim, the circuit court found that counsel requested an evaluation that indisputably demonstrated that petitioner was competent. It further determined that petitioner was criminally responsible and that while

> Dr. Miller's evaluation did not meet the legal criteria for proffering a defense of diminished capacity, he did state that petitioner's capacity may have been impaired. Therefore, the State took the opportunity to explore that issue. Any diminished capacity was irrefutably rebutted by Dr. Smith's opinion. Therefore, not only was diminished capacity unavailable as a defense because it lacked evidentiary foundation[,] it, as well as any other defense, was waived by entry of the plea.

The circuit court, thus, found that trial counsel had absolutely no reason to pursue a diminished capacity defense and that there was no psychiatric opinion that petitioner had diminished capacity. "In the absence of any opinion stating that petitioner lacked the ability to formulate the requisite mental elements of the offense of first-degree murder, the partial defense of diminished capacity was unavailing."

In its order, the circuit court further found that diminished capacity is a partial defense that does not absolve the individual of the crime, instead reducing the offense to a lesser included offense. The court stated that

> [p]etitioner received the benefit of a reduction in degree when he was permitted to plead guilty to second degree murder and attempted second degree murder. Therefore, he achieved what diminished capacity at trial would have achieved. [] The [c]ourt believes petitioner's rejection of his plea agreement, in order to pursue diminished capacity, or any other defense at trial, would have been irrational. He cannot demonstrate that any finder of fact would have agreed that his capacity was diminished in the absence of any psychiatric opinion that he met the necessary criteria . . . .

The circuit court noted that there was a possibility that a jury might have recommended mercy if petitioner had proceeded to trial but "even that conjecture is uncertain. The facts before the jury would have been that this man, utterly unprovoked, retrieved his firearm, loaded it, walked to his daughter's room, and shot her while she was practicing her guitar. . . ." Petitioner then "reloaded the gun, walked from his home to another house, and chased his son around until he shot him, too." As the circuit court recognized, the jury also would have heard that the petitioner had "previously threatened to shoot his children and himself. [] There was ample admissible evidence of all the elements of first-degree murder. Petitioner had no valid defense."

The circuit court went on to find that petitioner received effective representation of counsel. The court determined that they were effective advocates when they negotiated the plea and when

petitioner pled guilty. Counsel also successfully argued for a sentence less than the statutory maximum. Ultimately, the court found that counsel was "reasonably effective" and that petitioner had failed to satisfy either prong of the *Strickland*/*Miller* test.[1]

Finally, the circuit court found that petitioner's plea was not involuntary. It specifically found that

> [p]etitioner does not allege any factors other than the vicissitudes of life, that one would expect would be felt by any individual pleading guilty. He was worried about his family's housing. He was worried about his health. He was worried about the health of family members. None of those factors are the kinds of issues which [the circuit court] would find render a plea involuntary. . . . Similarly, this petitioner is claiming that he felt pressured by his own emotions into pleading guilty. That does not render a plea involuntary.

The habeas court went through the factors the circuit court went through in accepting petitioner's plea to find that petitioner entered a knowing, intelligent, and voluntary guilty plea. It noted that petitioner never stated during the plea hearing that he felt pressured into pleading guilty and never asked to stop the proceeding in its entirety or to speak to his attorney. Petitioner appeals from that December 9, 2020, order denying his petition for a writ of habeas corpus.

> 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).

On appeal, petitioner sets forth three assignments of error but divides his argument into two sections. Therefore, we will address the two issues argued by petitioner. First, he contends that the circuit court erred in finding that petitioner failed to demonstrate ineffective assistance of counsel due to counsel's failure to recognize petitioner's incapacity and lack of criminal responsibility at the time of the shootings and the issues facing petitioner. Without citing to the record, petitioner contends that his inability to make cognitive decisions due to his medical and psychological conditions was apparent and his lack of potential understanding was obvious to all

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[1] 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).

that interacted with him even in minimal amounts. Again, without citing to the record, he asserts that, as reflected in his forensic psychiatric evaluation, a review of his medical records indicated that petitioner was seventy years old and suffered from diabetes, hypertension, chronic renal disease, chronic anemia, hearing loss, osteoarthritis, chronic thrombocytopenia, kidney disease, atrial fibrillation, and lumbago. Further, Dr. Miller concluded that while petitioner was criminally responsible and competent to stand trial, at the time of the shootings petitioner was suffering from substance abuse induced early dementia but was currently suffering from a mild neurocognitive disorder.

Pointing to the opinions of Drs. Smith and Miller, petitioner contends that there were "clearly competing opinions of medical professionals regarding [p]etitioner's criminal responsibility at the time of the incident" and that "the record does not demonstrate what steps counsel for [p]etitioner completed in order to have the [c]ircuit [c]ourt make the final determination on this matter." However, he fails to cite to the record for these allegedly competing opinions. Without any explanation or citation to the record, he then jumps to his contention that he received ineffective assistance of counsel because counsel pressured him to take a plea offer. He also criticizes the circuit court for concluding that counsel correctly advised petitioner and handled petitioner's mental limitations and medical issues. He argues that such ineffective assistance warranted the grant of a writ of habeas corpus and that, without any specificity, the record reflects that petitioner established sufficient grounds for the same. Petitioner further asserts that he had multiple changes in counsel throughout the proceedings below.

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.

State v. Miller, 194 W. Va. 3, 16, 459 S.E.2d 114, 127 (1995).

> 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.

Id., 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." Syl. Pt. 3, in part, *Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 528 S.E.2d 207 (1999) (quoting *Miller*, 194 W. Va. at 6, 459 S.E.2d at 117, Syl. Pt. 5, in part).

Petitioner's argument ignores the fact that his counsel not only recognized petitioner's potential incapacity and/or lack of criminal responsibility, but also requested an evaluation to address the issue; that evaluation demonstrated that petitioner was competent. Both Drs. Miller and Smith specifically found that petitioner was competent to stand trial, in addition to being criminally responsible. Dr. Miller found that petitioner may have a "mild cognitive disorder," but he also found that petitioner did not have a disorder or mental state that prevented him from knowing his behavior was criminal. He further determined that petitioner could recognize the wrongfulness of his actions at the time of the shootings. Even after petitioner shot himself in the face, his Glasgow Coma score was fourteen out of fifteen, which "is not a score of an individual who is delirious or demented." Respondent asserts that petitioner has failed to show that the circuit court erred in finding that petitioner presented no evidence of a diminished capacity defense. In fact, Dr. Smith specifically found that petitioner had no cognitive impairment to support a diminished capacity defense. Dr. Miller found that petitioner's "neuropsychological function had actually improved" between his two examinations of petitioner. When Dr. Miller examined petitioner a second time, after petitioner pled guilty, he found that petitioner had a full recovery of any prior neuropsychological deficits. Further, a review of the plea hearing transcript belies petitioner's argument regarding his mental capacity, as he responded fully and appropriately to all questions asked by the court, including asking appropriate questions during the proceeding. Further, petitioner has not presented any evidence that his medical conditions or age impaired his cognitive abilities.

In addressing petitioner's change of counsel during the case, respondent points out that petitioner failed to cite to the record and the record reflects that attorney Ronni Sheets was counsel for petitioner throughout the proceedings, as evidenced by the fact that Ms. Sheets appeared at the preliminary hearing and the sentencing hearing. There was a single change of co-counsel when George Castelle had to be relieved as counsel, due to matters unrelated to this case, but Ms. Sheets remained on the case throughout and engaged co-counsel John Sullivan, Deputy Public Defender for Kanawha County. Respondent asserts that all counsel were highly respected, highly skilled, and experienced. Importantly, petitioner has not shown or even claimed in his brief that the outcome of the case would have changed but for counsels' actions. Petitioner does not assert that he would have gone to trial but for counsels' advice. Respondent further points out that petitioner was an alcoholic; he had previously made threats against the children, including pulling a gun on them at different times over the course of the preceding two years; he had struck the children previously; Child Protective Services had been involved with the family due to at least three prior

allegations of abuse and neglect; petitioner had a long history of anger issues; petitioner shot his daughter at point blank range; and petitioner reloaded the gun, threatened his son, and shot his son after chasing him down. Based on this overwhelming evidence, petitioner cannot show that he would have given up a beneficial plea agreement and proceeded to trial. We agree with respondent and find that the circuit court did not err in denying petitioner's petition for a writ of habeas corpus based upon ineffective assistance of counsel.

In his second assignment of error, petitioner argues that the circuit court erred by concluding that petitioner's plea was voluntary. Without any specificity, petitioner argues that a review of the record shows that he was incapable of rationally considering the plea and possible outcome of taking the plea offer. The motion to continue references statements made by petitioner to his counsel regarding the situation with his family home, which was destroyed in the Keystone Drive area due to a land slide and subsequent flooding. He contends that because his wife and three children were displaced, that "could cause anyone to suffer duress, anxiety and worry over the dire situation. . . . It was known to [p]etitioner that several family members' health was deteriorating fast and he was unable to assist or be near them in their time of need." He also points to his "medical complications" as a reason he felt under pressure, claiming that those issues should have been addressed by his attorneys and the circuit court. Petitioner argues that "[i]t cannot be said that it was unknown because the motion highlights [p]etitioner was feeling overwhelmed, uncomfortable, and possibly unable to thoughtfully enter a plea in the matter." Without further connecting the dots of his argument, he claims that his court-appointed counsel failed to correctly advise and inform petitioner or recognize his limitations and inability to comprehend the possible outcome of a plea agreement.

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.

Further, "[w]here 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 at 127; *see also State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 328, 465 S.E.2d 416, 430 (1995). 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 [h]abeas 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.

As set forth by respondent below, the plea was offered due to the request of the victims' family, which is also petitioner's family. Respondent argues that "[r]ather than be exposed to a life sentence without the possibility of parole—which was a very likely outcome in a case where a father shoots his child at point blank range with a shotgun, then chases down a second child to shoot him," petitioner received sentences of twenty years and one to three years, in addition to the dismissal of one charge. Thus, it would have been nonsensical for petitioner to proceed to trial. We agree. Further, with regard to petitioner's health issues, the circuit court aptly noted that petitioner "does not allege any factors other than the vicissitudes of life, that one would expect would be felt by any individual pleading guilty." His issues do not rise to the level of duress sufficient to invalidate a plea. Petitioner was found competent not once but twice with no evidence to the contrary, and he has failed to produce any evidence that he was in such duress as to negate his exercise of free will in pleading guilty. Therefore, we find no error in the circuit court's denial of petitioner's petition for a writ of habeas corpus. For these reasons, we affirm the circuit court's denial of petitioner's petition for a writ of habeas corpus.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

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

NOT PARTICIPATING:

Justice C. Haley Bunn