FILED
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EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Ricky Pendleton,
Petitioner Below, Petitioner

vs.) No. 21-0432 (Berkeley County No. 19-C-181)

Donald Ames, Superintendent,
Mt. Olive Correctional Center
Respondent Below, Respondent

MEMORANDUM DECISION

Self-represented petitioner Ricky Pendleton appeals the May 3, 2021, order of the Circuit Court of Berkeley County that denied his petition for post-conviction habeas corpus relief. The State, by counsel Patrick Morrissey and Scott E. Johnson, respond in support of the circuit court's order. Petitioner filed 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 affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

On May 22, 1996, petitioner was indicted by a Berkeley County grand jury for: (1) kidnapping; (2) malicious wounding; (3) grand larceny; and (4) aggravated robbery (Case No. 96-F-103). Those charges stemmed from an incident in which petitioner and an accomplice brutally beat Ryan Frankenberry and robbed him of his wallet and vehicle. *Pendleton v. Ballard*, No. 12-0653, 2013 WL 2477245, at *1 (W. Va. May 24, 2013) (memorandum decision). The beating was so severe that Mr. Frankenberry required multiple surgeries to repair the damage done to his facial bones, including the insertion of numerous titanium screws and plates. *Id.* A petit jury convicted petitioner on all counts, and recommended mercy on the kidnapping count. *Id.* The trial court sentenced petitioner to life in prison, with mercy, for his kidnapping conviction; two to ten years in prison for his malicious wounding conviction; one to ten years in prison for his grand larceny conviction; and sixty years in prison for his aggravated robbery conviction. *Id*. The court ordered the sentences to run consecutively to one another and to a prior federal sentence imposed upon petitioner. *Id.*

> Since that time, petitioner has filed the following: (1) a direct appeal to the Supreme Court of Appeals of West Virginia ("WVSCA"), which was denied; (2) a petition for evidentiary hearing, which was denied; (3) a Motion for Habeas Corpus with the Circuit Court of Berkeley County (Case No. 03-C-556), which was dismissed; (4) a Writ of Prohibition (Case No. 07-C-679), which was denied and dismissed; (5) a Writ of Coram Nobis (Case No. 08-C-17), which was denied and dismissed without prejudice; (6) reconsideration of the ruling on the Writ of Coram Nobis, which was denied; (7) another Notice of Appeal of Case No 08-C-17, which was denied; (8) a petition for Writ of Certiorari, which was denied; (9) a Rule 35 Motion to Reduce Sentence, which was denied as untimely; (10) a Petition for Writ of Habeas Corpus in each of three separate cases (Case Nos. 10-C-172, 10-C-695, 10-C-670), which were consolidated and dismissed without prejudice; (11) a Notice of Appeal in Case No. 10-C-670, which the WVSCA affirmed the Circuit Court's denial of petitioner's habeas petition; (12) a Motion for Reduction pursuant to Rule 35(a) and West Virginia Rule of Criminal Procedure 60(b), which was denied; (13) a petition for Writ of Habeas Corpus in Case No. 14-C-639, which was denied and dismissed; (14) a Notice of Appeal in Case No. 14-C-639, which the WVSCA affirmed the Circuit Court's denial; (15) a § 2254 petition in Case No. 3:16-cv-83, which this Court denied; and (16) a Motion for Relief Pursuant to Rule 60(b)(6), which this Court denied. On April 21, 2017, the Fourth Circuit denied petitioner's motion for authorization to file a second or successive application for relief under 28 U.S.C. § 2255. The Fourth Circuit also denied petitioner's motion for authorization to file a second or successive application for relief under 28 U.S.C. § 2254 on August 24, 2017.

Pendleton v. Terry, No. 3:17-CV-130, 2018 WL 5668611, at *1 (N.D.W. Va. Nov. 1, 2018), appeal dismissed, 755 F. App'x 303, 304 (4th Cir. 2019) (per curiam).

On May 29, 2019, petitioner filed yet another state circuit court petition for habeas corpus relief: case number CC-02-2019-C-181. The circuit court denied that petition on August 18, 2020. Petitioner did not appeal that order. However, on January 14, 2021, petitioner filed in the circuit court an

> Expedited Motion for Relief Pursuant to Rules 60(b)(1), (4), & (6) of the West Virginia Rules of Civil Procedure for Mistakes, Unavoidable Cause(s), and Judgment is Void Given 'Notice' of 'Plain Error' Standard in the case No. CC-02-2019-C 181 in Violating Petitioner's Substantial Rights.

On June 3, 2021, the circuit court entered an order denying petitioner's Rule 60(b) motion. Petitioner now appeals. "This Court has consistently held that a circuit court's decision to grant or deny a Rule 60(b) motion warrants a deferential review by this Court." *McClung, LLC v. Any Unknown Heirs of Frank C. Ringer*, No. 14-0842, 2015 WL 3674502, at *4 (W. Va. June 12, 2015).

Petitioner raises the following five assignments of error on appeal:

ISSUE ONE: Whether the circuit court abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void, and with given notice of a "plain error" doctrine violation committed a CONSTRUCTIVE AMENDMENT, where it had instructed the petit jury on three (3) new elements such as "conceal"; "enticement"; and "entice away" which was not alleged in the indictment for the charge of kidnapping?

ISSUE TWO: Whether the circuit court had abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void, and with given notice of a "plain error" doctrine violation where the indictment was so defective to wrongfully allege with "INTENT TO CAUSE BODILY INJURY" instead of the proper statutory language for the charge of malicious assault.

ISSUE THREE: Whether the circuit court had abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void and with given notice of a "plain error" doctrine violation of NOT fully and plainly informing of the nature and cause based on the COMMON-LAW DEFINITION at precedence for the charge of aggravated robbery.

ISSUE FOUR: Whether the circuit court had abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void and with given notice of a "plain error" doctrine violation NOT properly the "VALUE" of the 1987 Porsche which was alleged stolen for a charge of grand larceny.

ISSUE FIVE: Whether the circuit court had abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void and with given notice of a "plain error" doctrine violation committed DOUBLE JEOPARDY, by charge and conviction of both greater and lesser-included offense for the charges of robbery and grand larceny WITHOUT alleging two additional offenses separating both charges.[1]

Respondent, Donald Ames, Superintendent, Mt. Olive Correctional Center, correctly summarizes petitioner's five assignments of error into the following single assignment of error: The circuit court abused its discretion in denying petitioner's motion for relief under Rule 60(b) of the West Virginia Rules of Civil Procedure. Respondent concludes that petitioner failed to show

[1] We note that petitioner, who filed this appeal (No. 21-0432) with the Court on May 25, 2021, raises the exact same five issues that he raised in an appeal that he filed on May 13, 2021. *See State v. Pendleton*, No. 21-0384.

that the circuit court abused its broad discretion in denying petitioner's Rule 60(b) motion and, therefore, argues that the order on appeal should be affirmed.

Rule 10 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings provides that "[t]he West Virginia Rules of Civil Procedure, to the extent that they are not inconsistent with these [habeas] rules, may be applied, when appropriate, to petitions filed in West Virginia circuit courts under these rules." Accordingly, where appropriate, Rule 60(b) of the Rules of Civil Procedure applies to habeas cases. *See Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). Thus, petitioner may invoke Rule 60(b); however, he must satisfy all of the procedural and substantive obligations that Rule 60(b) imposes before relief may be granted. Here, petitioner fails to satisfy those Rule 60(b) obligations and, therefore, is entitled to no relief.

This Court has said that Rule 60(b) is to be liberally construed to accomplish justice and to facilitate the decision of cases on their merits. Syl. Pt. 6, *Toler v. Shelton*, 157 W. Va. 778. 204 S.E.2d 85 (1974). Here, petitioner received a judgment on the merits denying his petition for habeas corpus relief. Accordingly, the liberal thrust of Rule 60(b) has no application to petitioner's appeal. Rather, once a judgment is rendered on the merits, "'[r]arely is relief granted under [Rule 60(b)] because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not liberally granted.'" *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W.Va. 692, 704 n.21, 474 S.E.2d 872, 884 n.21 (1996) (quoting *Cox v. State*, 194 W. Va. 210, 219 n.5, 460 S.E.2d 25, 34 n.5 (1995) (Cleckley, J. concurring) (citations omitted)).

"This Court has consistently held that a circuit court's decision to grant or deny a Rule 60(b) motion warrants deferential review by this Court." *McClung,* 2015 WL 3674502, at *4. Thus, "[a] motion to vacate a judgment made pursuant to Rule 60(b), W.Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syl. Pt. 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974).

Here, we find that the circuit court did not abuse its discretion in refusing to grant petitioner's Rule 60(b) motion. Rule 60(b) provides:

> **Mistakes; Inadvertence; Excusable Neglect; Unavoidable Cause; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than

> one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

"It is a well settled principle of law that a Rule 60(b) motion seeking relief from a final judgment is not a substitute for a timely and proper appeal." *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993). Therefore, "[a]n appeal of the denial of a Rule 60(b) motion . . . brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." *Toler*, 157 W. Va. at 784, 204 S.E.2d at 89.

The movant bears the burden of proof under Rule 60(b). *See*, *e.g.*, *Powderidge*, 196 W. Va. at 706, 474 S.E.2d at 886 ("A circuit court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it."); *State ex rel. Charleston Area Med. Ctr., Inc., v. Kaufman*, 197 W. Va. 282, 289, 475 S.E.2d 374, 381 (1996) ("Rule 60(b) imposes a heavy burden on the movant[.]"), *overruled on other grounds by Burkes v. Fas-Chek Food Mart, Inc.*, 217 W. Va. 291, 617 S.E.2d 838 (2005). Moreover, "the weight of authority supports the view that Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit." *Powderidge*, 196 W. Va. at 705, 474 S.E.2d at 885. "In other words, a Rule 60(b) motion to reconsider is simply not an opportunity to reargue facts and theories upon which a court has already ruled." *Id.* at 706, 474 S.E.2d at 886. Here, petitioner fails to carry his burden on appeal as he does no more than disagree with the circuit court's substantive ruling. "[D]isagreement with the merits of the underlying judgment simply is not a reason for relief under Rule 60(b)." *Bell v. McAdory*, 820 F.3d 880, 883 (7th Cir. 2016). At best, his appellate brief simply restates the arguments he raised in his two prior petitions for habeas relief before this Court, which the Court rejected. Thus, petitioner fails to satisfy the requirements of Rule 60(b) and, therefore, to show that the circuit court abused its discretion in denying relief.

Finally, "[w]hile a defendant is entitled to due process of law, he is not entitled to appeal upon appeal, attack upon attack, and Habeas corpus upon Habeas corpus. There must be some end to litigation[.]" *Call v. McKenzie*, 159 W. Va. 191, 194, 220 S.E.2d 665, 669 (1975). That end time has come for petitioner.

Accordingly, for the foregoing reasons, we affirm the circuit court's May 3, 2021, order denying petitioner habeas relief.

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