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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Isaiah Murphy,
Plaintiff Below, Petitioner

vs.) No. 21-0457 (Clay County 19-P-10)

Shawn Straughn, Superintendent,
Northern Correctional Facility,
Defendant Below, Respondent

MEMORANDUM DECISION

Petitioner Isaiah Murphy, by counsel Timothy J. LaFon, appeals the Circuit Court of Clay County's January 6, 2021, order denying his petition for a writ of habeas corpus. Respondent Shawn Straughn, 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 July of 2015, the Clay County grand jury indicted petitioner on one count each of robbery and conspiracy to commit robbery stemming from an incident in which petitioner and his co-defendant allegedly robbed a convenience store while wielding a machete and demanding cash. The Clay County grand jury also indicted petitioner on one count of burglary, one count of grand larceny, and one count of conspiracy to commit burglary related to an incident in which petitioner and his co-defendant allegedly entered the victim's residence without breaking and stole the victim's personal property. In November of 2015, the State filed an information charging petitioner with one count of robbery stemming from an incident in which petitioner and his co-defendant allegedly stole prescription drugs from the victim while wielding a knife. Thereafter, petitioner entered into a global plea agreement to resolve all charges. Petitioner pled guilty to two counts of robbery and one count of burglary. As part of the agreement, the State agreed to dismiss or not prosecute eleven other serious crimes charged against petitioner. The circuit court sentenced petitioner to fifty years of incarceration for each of the two counts of robbery, to be served consecutively, and one to ten years of incarceration for one count of burglary, to be served

concurrently to the robbery charges. Petitioner appealed that sentence to this Court, which was affirmed in *State v. Murphy*, No. 16-0362, 2017 WL 2229980 (W. Va. May 22, 2017)(memorandum decision). Petitioner's trial counsel also filed a motion for reconsideration in the circuit court, which was denied following a September 18, 2017, hearing.

Petitioner next filed a petition for a writ of habeas corpus on June 14, 2019, and after counsel was appointed, counsel filed an amended petition for a writ of habeas corpus on August 4, 2020. The circuit court held an omnibus hearing on the petition on October 29, 2020, before entering its January 6, 2021, order denying the petition for a writ of habeas corpus. In that order, the circuit court noted that petitioner's sole ground for relief was ineffective assistance of petitioner's trial counsel. He asserted that counsel failed to investigate his case, failed to answer his questions, and failed to appear at the sentencing hearing "numerous times prior to being relieved." Applying the *Strickland/Miller* standard, the circuit court found that petitioner had failed to meet his burden of proof under the first prong of the inquiry.[1] It found that while petitioner asserted that his counsel failed to investigate the case, answer his questions, or appear at the sentencing hearing,

> the record in this case namely, the plea hearing transcript indicates the opposite to be true. Having thoroughly reviewed the aforesaid transcript in this matter, the [c]ourt finds the same unequivocally establishes that during his colloquy with the trial court, the petitioner acknowledged (1) he was satisfied with Mr. [Kevin] Duffy's representation; (2) Mr. Duffy had not failed to do anything that petitioner felt he should have done in his case; (3) he had no complaints whatsoever about Mr. Duffy or his representation; (4) all of petitioner's responses were truthful; and (5) he had no questions about any of the trial court's explanations, his rights or the terms of the plea agreement. [] Further, the same transcript additionally reflects Mr. Duffy, through extensive colloquy with the trial court, had thoroughly invest[igat]ed the facts and circumstances of each of the cases and while meritorious defenses existed, given the number of dismissals and agreements not to prosecute under the universal plea agreement, this plea was in his client's best interest.

An ethics complaint was filed against petitioner's attorney. The circuit court further found

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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 petitioner's reliance on Mr. Duffy's case before the Office of Disciplinary Counsel[2] and subsequent suspension from the practice of law to argue that petitioner received ineffective assistance of counsel was a "red herring." It noted that while Mr. Duffy failed to appear at sentencing, Mr. Duffy was replaced as counsel at sentencing and there were no allegations of ineffective assistance of counsel as to his new counsel, Kevin Hughart. The circuit court found that because petitioner failed to prove ineffective assistance of counsel, there was no question that Mr. Duffy's representation was objectively reasonable and that of a similarly situated criminal defense attorney.

Further, assuming, arguendo, that petitioner had met the first prong, the court found that petitioner also could not satisfy the second prong of the *Strickland/Miller* test. It noted that not only did petitioner indicate during the plea hearing that he was guilty of the crimes but he also confirmed that his entry of the plea was knowing, free, and voluntary. According to the circuit court, petitioner stated multiple times during his omnibus hearing testimony that he was guilty and committed the crimes for which he was convicted, in addition to admitting that he had no evidence to prove that he was innocent of any of the crimes for which he was convicted or any of the charges dismissed pursuant to the plea agreement. It, therefore, concluded that petitioner could not satisfy *Strickland/Miller* so petitioner's ineffective assistance claim must be denied as a matter of law. Petitioner appeals from that January 6, 2021, 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 two assignments of error. First, he contends that the circuit court erred by denying the requested habeas relief because he received ineffective assistance of counsel. Petitioner asserts that he had no communication from Mr. Duffy between the November 6, 2015, plea hearing and the January 19, 2016, sentencing hearing for which Mr. Duffy failed to appear. Petitioner claims that Mr. Duffy spent insufficient time with him throughout the proceedings and often did not return his calls. Petitioner contends that Mr. Duffy's conduct did not meet the reasonableness standard of a practicing attorney. He also asserts that Mr. Duffy's conduct harmed him by adversely affecting him and he is critical of Mr. Duffy's lack of investigation of possible defenses. According to petitioner, Mr. Duffy's inaction calls into question his competency and his due diligence in representing petitioner. Finally, petitioner asserts that Mr. Duffy's actions prejudiced him, though he does not identify what actions Mr. Duffy should have taken or how he was prejudiced.

As we have found,

[2] Petitioner discusses the facts of Mr. Duffy's disciplinary case in his recitation of the facts. Without citing to the record, petitioner asserts that Judge Alsop initiated a complaint against Mr. Duffy due to his actions and failure to assist his clients.

> 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. 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).

Respondent asserts that even assuming, arguendo, that Mr. Duffy's performance was so deficient so as to satisfy the first *Strickland/Miller* prong, petitioner has not identified any prejudice that resulted from such performance. It is important to note that, in order to prove prejudice under *Vernatter*, the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). In particular, petitioner has never claimed that he did not desire to enter into the plea agreement; respondent asserts that this failure is fatal to proving the second prong of *Strickland/Miller*, even if petitioner had been able to satisfy the first prong. Respondent asserts that, moreover, petitioner's arguments are legally insufficient because they are self-serving, conclusory, and unsupported statements devoid of any factual or legal support in the record. *See State ex rel. Franklin v. McBride*, 226 W. Va. 375, 381, 701 S.E.2d 97, 103 (2009). Thus, respondent contends that petitioner has not and cannot demonstrate that the circuit court

abused its discretion in concluding that he did not suffer from ineffective assistance of counsel. We agree. For the reasons put forth by respondent, we find that petitioner has failed to show that any alleged ineffective assistance of counsel resulted in prejudice to petitioner, particularly where he received a substantial benefit as a result of the plea agreement with the dismissal of eleven counts against him and he declined an invitation from the circuit court to meet with Mr. Duffy during the plea hearing if petitioner had any questions.

Petitioner next argues that he was entitled to habeas relief because his pleas were involuntary. He asserts that Mr. Duffy advised him that in order to reap the benefits of the plea bargain petitioner could not refute anything the circuit court asked him, which was why he answered several questions in the affirmative during the plea hearing. After reiterating some of his arguments set forth above regarding the lack of communication with Mr. Duffy throughout the proceedings, he contends that Mr. Duffy "never said one time that he would try my case. He wanted – he was adamant about taking a plea agreement."

Because petitioner argues that his plea was involuntary, we must 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, 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 circuit 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 court complied with the mandates of *Call* in conducting petitioner's plea colloquy. As the circuit court found during petitioner's habeas proceeding, during the plea colloquy petitioner acknowledged that he was satisfied with counsel's representation, that Mr. Duffy "had not failed to do anything" petitioner believed should have been done in his case, that he had no complaints with regard to his representation by Mr. Duffy, and he had no questions regarding the plea agreement.

We further agree with respondent that the sixty-four-page transcript of petitioner's plea hearing is filled with petitioner confirming that he was entering his plea voluntarily, with full knowledge of his rights, his waiver of those rights, and whether he did so with the advice and assistance of competent counsel. During the hearing, the circuit court even afforded petitioner the opportunity to speak with Mr. Duffy out of the presence of the court after it advised him of his rights and the corresponding waivers, but petitioner declined that offer. Importantly, petitioner does not assert that he would have rejected the plea agreement and proceeded to trial if given the opportunity. He fails to identify any evidence or possible defenses that tend to show that it would have been potentially beneficial to proceed to trial. We, therefore, find that the circuit court did not err in denying petitioner's petition for a writ of habeas corpus on this ground.

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