

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED

November 18, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30618

RELEASED

November 18, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ANDREW MUGNANO,
Petitioner Below, Appellant

v.

HOWARD PAINTER, WARDEN, MT. OLIVE
CORRECTIONAL COMPLEX,
Respondent Below, Appellee

Appeal from the Circuit Court of Greenbrier County
Honorable James J. Rowe, Judge
Civil Action No. 01-C-93(R)

AFFIRMED

Submitted: October 29, 2002
Filed: November 18, 2002

Richard H. Lorenson, Esq.
Public Defender Corporation
Lewisburg, West Virginia
Attorney for Appellant

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Attorney General
Heather D. Foster
Assistant Attorney General
Charleston, West Virginia
Attorneys for Appellee

The Opinion of the Court was delivered PER CURIAM.
JUSTICES STARCHER and ALBRIGHT dissent and reserve
the right to file dissenting opinions.

SYLLABUS

“Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976).

Per Curiam:

This is an appeal by Andrew Mugnano, who is incarcerated in the State Penitentiary for first degree murder and for malicious wounding, from a decision of the Circuit Court of Greenbrier County denying him habeas corpus relief. In his *pro se* habeas corpus petition, he claimed that the State of West Virginia had breached the plea agreement which had resulted in his conviction and that his counsel at that time had failed to afford him effective assistance of counsel by failing to object to the State's failure to comply with the agreement. He also requested that the court appoint counsel to assist in the presentation of his case. In denying the appellant habeas corpus relief, the circuit court, without appointing counsel as requested, concluded that the appellant had failed to show adequate grounds for relief. In the present proceeding, the appellant claims that the circuit court erred in failing to appoint counsel to assist him in the preparation and presentation of his habeas corpus claims and that the court erred in denying him a meaningful hearing on the question of whether the plea agreement was breached and whether his trial attorney's performance was deficient.

I.
FACTS

The appellant was indicted for murdering his wife, Theresa Mugnano, and for maliciously wounding her companion.¹ He eventually entered into a plea agreement with the State of West Virginia whereby he agreed to plead guilty, and the State agreed to remain mute as to the sentence which he was to receive. The agreement specifically provided:

2. **RESOLUTION OF CHARGES:** Defendant agrees to plead guilty as charged in the indictment to one count of the felony offense of murder in the first degree and one count of the felony offense of malicious wounding.

* * *

6. **FINAL DISPOSITION:** The matter of sentencing is within the sole discretion of the Court. The State has made no representations or promises regarding a specific sentence, and it will make no recommendation to the Court regarding a specific sentence. This agreement does not preclude the investigating officer from filing a written, “official sentiment” with the Probation Officer conducting the presentence investigation. Nor does this agreement preclude the victim or victims from speaking to the Court as set forth below. Furthermore, the State reserves the right to:
 - (a) Inform the Probation Office and the Court of all relevant facts and conduct;
 - (b) Address the Court with respect to the nature and seriousness of the offense;
 - (c) Respond to questions raised by the Court;
 - (d) Correct inaccuracies or inadequacies in the presentence report;

¹In the indictment, Theresa Mugnano’s first name is spelled “Theresa.” At other points in the record, her name is spelled “Teresa.”

- (e) Respond to statements made to the Court by or on behalf of the Defendant which the State believes in good faith are inaccurate, misleading or untrue;
- (f) Advise the Court concerning the nature and extent of Defendant's cooperation; and
- (g) Address the Court regarding the issue of Defendant's acceptance of responsibility.

A sentencing hearing was held on May 5, 2000, and at that hearing the prosecutor stated: "One comment that Mr. Thompson [defense counsel] made is that, 15 or 18 years from now, Mr. Mugnano [the appellant] will be an old man, and I'd just like to say that Theresa Mugnano will still be dead." The appellant's attorney did not object to this, and the circuit court sentenced the appellant to life in the penitentiary without mercy. In imposing the sentence, the court noted that the appellant had failed to accept responsibility for committing the crime and that a lesser sentence would depreciate the seriousness of the offense.

The appellant believed that the prosecutor's comment relating to the fact that Theresa Mugnano would still be dead in 15 to 18 years was a remark as to the sentence he would receive and violated the State's plea agreement. As a consequence, the appellant attempted to appeal his conviction to this Court on the ground that the prosecutor's remark violated the plea agreement, and on the further ground that the sentence imposed was unconstitutional. This Court refused to grant the appellant's appeal on April 3, 2001.

Subsequently, on May 9, 2001, the appellant filed the *pro se* habeas corpus proceeding which gives rise to the present appeal. In it, he again asserted that the prosecutor's remark relating to Theresa Mugnano still being dead in 15 to 18 years constituted a comment on the sentence which he was to receive and violated his plea agreement with the State. He also claimed that his trial counsel had provided him with ineffective assistance of counsel when counsel failed to object to the prosecutor's remarks. In conjunction with his *pro se* habeas corpus petition, the appellant requested that the trial court appoint counsel to represent him during the habeas corpus proceeding.

Without ruling on the appellant's request for the appointment of counsel, the Circuit Court of Greenbrier County denied the appellant's habeas corpus petition on May 31, 2001, relating to the appellant's claim that the State had breached its plea agreement, the trial court stated:

After reviewing the plea agreement, however, this Court finds that the State had specifically reserved the right to address this Court regarding the issue of acceptance of responsibility. Furthermore, the State had reserved the right to address other issues, such as the nature and seriousness of the offense. In light of the language of the plea agreement, this Court concludes that the State did not violate the plea agreement. . . .

In the present appeal, the appellant claims that the circuit court erred in failing to appoint counsel to represent him during the habeas corpus proceeding and that the court

erred in finding that the State had not violated the plea agreement and implicitly finding that he had received adequate representation of counsel.

II. STANDARD OF REVIEW

In Syllabus Point 1 of *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976), this Court held that: “Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” The Court has also indicated that a circuit court’s final order and ultimate disposition are reviewed under the abuse of discretion standard and that conclusions of law are reviewed *de novo*. *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997).

III. DISCUSSION

As has previously been indicated, the appellant in the present proceeding claims that the circuit court erred in failing to appoint counsel to assist him in prosecuting his habeas corpus claims.

Rule 4(b) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia provides that a circuit court is, after conducting an initial review of a post-conviction habeas corpus petition, authorized to appoint counsel to represent the petitioner's claims, provided the petitioner is an indigent. However, there is no requirement that a court, in every instance, appoint counsel. Consistent with this, the Court held in Syllabus Point 1 of *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973): "A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief."

In the present case, the circuit court concluded that the appellant failed to show or allege any ground for relief, which, if sufficiently developed, would entitle him to relief. Specifically, the Court, which had the plea agreement, noted that in that agreement, the State reserved the right to discuss the appellant's acceptance of responsibility and such other matters as the nature and seriousness of the offense. The Court also essentially found that the remark made by the prosecutor was made consistent with the rights reserved by the State in the plea agreement and did not constitute a violation of the agreement.

This Court, after reviewing the record in this case, finds that while in the plea agreement the State stated that it would not make a recommendation to the court regarding a

specific sentence, the State did not agree to remain wholly silent about the crime charged. To the contrary, the State reserved the right to address the court with respect to the nature and seriousness of the offense and the right to respond to statements made by or on behalf of the appellant. The State also reserved the right to address the court regarding the appellant's acceptance of responsibility.

This Court believes that the remark that Theresa Mugnano would still be dead in 15 or 18 years was not a recommendation regarding a specific sentence. Rather, it was a remark bearing on the nature and seriousness of the offense committed, and a remark made in response to a comment by defense counsel. In essence, the Court believes that the remark was proper and was not violative of the plea agreement. Obviously, if the remark did not violate the agreement, defense counsel did not render ineffective assistance by failing to object to it.

Since this Court has concluded that the claims encompassed in the habeas corpus petition failed to show that the appellant is entitled to habeas corpus relief, given the record in the appellant's criminal proceeding, this Court cannot conclude that the trial court was clearly wrong in denying the appellant's habeas corpus petition and in refusing to appoint counsel to assist the appellant in developing the claims contained in that petition.

IV.
CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Greenbrier County
is affirmed.

Affirmed.