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

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Albright, Justice, dissenting:

I must respectfully dissent. The majority affirms the lower court's decision to deny the Appellant's habeas corpus petition without appointing counsel to assist the Appellant in developing his habeas corpus claims. Indeed, as explained in syllabus point two of *State ex rel. Blake v. Chafin*, 183 W.Va. 269, 395 S.E.2d 513 (1990), this Court has consistently held that:

“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.” Syl. Pt. 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

See W. Va. Code § 53-4A-4(a) (1981) (Repl. Vol. 2000).¹

¹West Virginia Code § 53-4A-4(a), part of the Post-Conviction Habeas Corpus Act, West Virginia Code §§ 53-4A-1 to -11, provides as follows:

A petition filed under the provisions of this article may allege facts to show that the petitioner is unable to pay the costs of the proceeding or to employ counsel, may request permission to proceed in forma pauperis and may request the appointment of counsel. If the court to which the writ is returnable (hereinafter for convenience of reference referred to simply as “the court,” unless the context in which used clearly indicates that some other court is intended) is satisfied that the facts alleged in this regard

are true, and that the petition was filed in good faith, and has merit or is not frivolous, the court shall order that the petitioner proceed in forma pauperis, and *the court shall appoint counsel for the petitioner*. If it shall appear to the court that the record in the proceedings which resulted in the conviction and sentence, including, but not limited to, a transcript of the testimony therein, or the record or records in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, or all of such records, or any part or parts thereof, are necessary for a proper determination of the contention or contentions and grounds (in fact or law) advanced in the petition, the court shall, by order entered of record, direct the State to make arrangements for copies of any such record or records, or all of such records, or such part or parts thereof as may be sufficient, to be obtained for examination and review by the court, the State and the petitioner. The State may on its own initiative obtain copies of any record or records, or all of the records, or such part or parts thereof as may be sufficient, as aforesaid, for its use and for examination and review by the court and the petitioner. If, after judgment is entered under the provisions of this article, an appeal or writ of error is sought by the petitioner in accordance with the provisions of section nine [§ 53-4A-9] of this article, and the court which rendered the judgment is of opinion that the review is being sought in good faith and the grounds assigned therefor have merit or are not frivolous, and such court finds that the petitioner is unable to pay the costs incident thereto or to employ counsel, the court shall, upon the petitioner's request, order that the petitioner proceed in forma pauperis and shall appoint counsel for the petitioner. If an appeal or writ of error is allowed, whether upon application of the petitioner or the State, the reviewing court shall, upon the requisite showing the request as aforesaid, order that the petitioner proceed in forma pauperis and shall appoint counsel for the petitioner. If it is determined that the petitioner has the financial means with which to pay the costs incident to any proceedings hereunder and to employ counsel, or that the petition was filed in bad faith or is without merit or is frivolous, or that

This Court has also acknowledged that courts are generally afforded broad discretion when considering whether a petition requesting post-conviction habeas corpus relief has expressed sufficient grounds. *State ex rel. Valentine v. Watkins*, 208 W.Va. 26, 537 S.E.2d 647 (2000). However, in determining whether the petition and accompanying documents indicate that the petitioner is entitled to relief, the reviewing court must evaluate the request in a manner consistent with legislative design for post-conviction habeas relief. As this Court enunciated in syllabus point two of *State ex rel. Burgett v. Oakley*, 155 W.Va. 276, 184 S.E.2d 318 (1971), “[t]he intent of the Post-Conviction Habeas Corpus Act, Code, 53-4A-1, *et seq.*, as amended, was to liberalize, rather than restrict, the exercise of the writ of habeas corpus in criminal cases.” *See also Adams v. Circuit Court of Randolph County*, 173 W.Va. 448, 317 S.E.2d 808 (1984); *State ex rel. Ridenour v. Leverette*, 165 W. Va. 770, 271 S.E.2d 612 (1980).² In *Ridenour*, this Court emphasized that both prior judicial precedent and

review is being sought or prosecuted in bad faith or the grounds assigned therefor are without merit or are frivolous, the request to proceed in forma pauperis and for the appointment of counsel shall be denied and the court making such determination shall enter an order setting forth the findings pertaining thereto and such order shall be final.

W. Va. Code § 53-4A-4(a) (emphasis supplied).

²The significance of the writ of habeas corpus as a legal remedy is illustrated by the fact that it has been aptly referenced as “the safeguard and the palladium of our liberties.” *In re Begerow*, 65 P. 828, 829 (Cal. 1901). It has also been “regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release. . . .” *In re Ford*, 116 P. 757, 759 (Cal. 1911). The United States Supreme Court has explained that the writ of habeas corpus “is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.” *Harris v. Nelson*, 394 U.S. 286, 290 (1969).

the express language of the act require liberal construction of the post-conviction habeas guidelines:

The Post-Conviction Habeas Corpus Act is broad in its scope and purpose. Section 10 of the statute states that the provisions of the entire article “shall be liberally construed so as to effectuate its purposes.” And in *State ex rel. Burgett v. Oakley*, 155 W.Va. 276, 184 S.E.2d 318 (1971), this Court held that the intent of the Post-Conviction Habeas Corpus Act is to liberalize, not restrict, the exercise of habeas corpus writs in criminal cases.

165 W. Va. at 772-73, 271 S.E.2d at 614.

In *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984), this Court explained that the post-conviction habeas corpus statute envisions that the decision regarding whether to conduct an evidentiary hearing is left “in large part to the sound discretion of court before which the writ is made returnable.” 173 W. Va. at 688, 319 S.E.2d at 813. “This discretion is not unlimited, however, and the court must be guided by the necessities of each particular case.” *Id.* at 688-89, 319 S.E.2d at 813. The *Gibson* Court noted that the statute “clearly contemplates that a petitioner for post-conviction habeas corpus review is entitled to careful consideration of his claims for relief. . . .” *Id.* at 689, 319 S.E.2d at 814. This meticulous consideration is mandated “in order to assure that no violation of [petitioner’s] due process rights could have escaped the attention of either the trial court or the Supreme Court of Appeals.” *Shamblin v. Hey*, 163 W. Va. 396, 399, 256 S.E.2d 435, 437 (1979). As expressed by the United States Supreme Court, “where specific allegations before the court

show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.” *Harris v. Nelson*, 394 U.S. 286, 300 (1969).

The *Gibson* Court also discussed the obstacles to full development of a petitioner’s claims based upon his status as a prisoner, explaining as follows:

The right to access to relevant evidence in the possession of the State is a component of the right to full consideration of one’s claims. Certainly, the habeas petitioner, by virtue of his status as a prisoner, is almost always at a disadvantage in developing the evidence necessary to support his allegations. The court to which a motion for production of documents or records is addressed in a habeas proceeding should exercise flexibility in ruling on the motion. Where the petitioner can demonstrate that materials in the possession of the State contain relevant evidence which would enable him to prove specific allegations entitling him to relief, the court should grant the motion.

173 W.Va. at 689, 319 S.E.2d at 814. The *Gibson* Court also discussed the criteria for the determination regarding whether a petitioner is entitled to an evidentiary hearing:

With respect to the issue of whether, in a particular case, the petitioner is entitled to a full evidentiary hearing, the ultimate question to be decided by the court is whether the petitioner has had a full and fair hearing at some stage of the proceeding with respect to the contentions raised in his petition. If the facts were sufficiently developed at or before trial so that the court can rule on the issue presented without further factual development, the court may, in its discretion, decline to conduct an evidentiary hearing during the habeas proceeding and may rule on the merits of the issues by reference to the facts demonstrated on the record.

Id. at 689, 319 S.E.2d at 814; *see also State ex rel. Farmer v. Trent*, 206 W.Va. 231, 523 S.E.2d 547 (1999), *cert. denied*, 529 U.S. 1134 (2000).

Standards regarding entitlement to post-conviction habeas corpus relief were clarified and enhanced by the adoption of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, taking effect immediately upon their issuance on December 13, 1999, and, by their own terms, applying to “all post-conviction habeas corpus matters pending in the circuit courts of this State on the date of [adoption of the rules].” *See State ex rel. Parsons v. Zakaib*, 207 W. Va. 385, 390, 532 S.E.2d 654, 659 (2000). Habeas Corpus Rule 1 sets forth the purpose and scope of the rules and explains that the “rules have been adopted to provide the procedure for post-conviction habeas corpus proceedings as they are set forth in West Virginia Code § 53-4A-1 et seq.”

Habeas Corpus Rule 4(b) provides as follows, with regard to the appointment of counsel for indigents petitioning for habeas corpus relief:

If, upon initial review of the petition and any exhibits in support thereof, the court determines that the petitioner may have grounds for relief but the petition, as filed, is not sufficient for the court to conduct a fair adjudication of the matters raised in the petition, *the court shall appoint an attorney* to represent the petitioner’s claims in the matter, provided that the petitioner qualifies for the appointment of counsel under Rule 3(a) [indigence]. The court may order appointed counsel to file an amended petition for post-conviction habeas corpus relief within the time period set by the court. (Emphasis supplied.)

Habeas Corpus Rule 6 provides as follows regarding the appointment of counsel:

If counsel has not been previously appointed as provided in Rule 4(b), and the petition is not summarily dismissed, *the court may appoint counsel to represent the petitioner.* Counsel may only be appointed if the petitioner qualifies for the appointment of counsel under Rule 3(a) [indigence], *and the court has determined that the petition was filed in good faith and that the appointment of counsel is warranted. If warranted, the court shall appoint counsel for the petitioner.* (Emphasis supplied.)

Habeas Corpus Rule 7(a) provides as follows regarding discovery:

Leave of court required.--In post-conviction habeas corpus proceedings, a prisoner may invoke the processes of discovery available under the West Virginia Rules of Civil Procedure if, and to the extent that, the court in the exercise of its discretion, and for good cause shown, grants leave to do so. If necessary for effective utilization of discovery procedures, *counsel shall be appointed* by the court for a petitioner who qualifies for the appointment of counsel under Rule 3(a) [indigence]. (Emphasis supplied.)

As apparent from the recitation above, the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia clearly and repeatedly articulate the underlying objective to provide full and comprehensive relief in the form of the provision of legal counsel where necessary. Rule 4 addresses appointment of counsel where the petition is not sufficient to allow full evaluation; Rule 6 addresses appointment of counsel where the petition was filed in good faith and where appointment of counsel is warranted; Rule 7 addresses appointment of counsel where necessary to implement discovery procedures. Although the determination

of whether counsel should be appointed is within the sound discretion of the lower court, such discretion can be abused, and I believe that such abuse of discretion occurred in this case.

The majority compounds this error by applying a “clearly wrong” standard of review to the lower court’s ultimate determination. I would submit that the “clearly wrong” standard is applicable only to factual determinations made by the reviewing court, and that the “abuse of discretion” standard is more appropriately applied to the lower court’s ultimate determination regarding whether a habeas corpus petitioner is entitled to the appointment of counsel to assist him in the presentation of his habeas corpus claims. The majority recites the germane syllabus points enunciating these applicable standards, noting that this Court is to review the lower court’s ultimate disposition under an abuse of discretion standard. Yet the majority opinion thereafter fails to apply this standard in its final analysis, explaining only that “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. . . .” In my opinion, the majority’s holding that the lower court’s factual findings were not clearly wrong does not provide an answer to the question presented to this Court on appeal. The precise question posed is whether the lower court abused its discretion in the denial of the petition and in the refusal to appoint counsel, rather than the more general question of whether the lower court was clearly wrong in any of its factual findings.

The Appellant in this matter, acting pro se, raised a significant issue regarding ineffective assistance of counsel, as well as other issues.³ The legal sophistication of the issues raised by the Appellant pro se, involving the interplay between the state's alleged violation of a plea agreement and the Appellant's trial counsel's failure to object, indicated the necessity for professional legal assistance in order to enable the presentation and consideration of the issues in a fair and meaningful manner. The May 31, 2001, order of the lower court identified the myriad of legal issues raised by the Appellant. A brief review of those matters reveals that the Appellant, acting pro se, would be very unlikely to possess the legal competence or experience necessary to investigate, research, develop, and present the legal components of these claims without the assistance of counsel. With regard to the Appellant's claim of ineffective assistance of counsel, for instance, the Appellant raised issues regarding whether counsel should have provided him with exculpatory information from a private investigator, whether counsel fully investigated the evidence, whether counsel failed to move for an in camera hearing regarding the admissibility of evidence and the Appellant's competence, whether counsel failed to question potential defense witnesses, whether counsel failed to inform the court that the Appellant wanted to withdraw his plea, and whether counsel appropriately handled issues of the Appellant's drug and alcohol addiction. Where counsel was

³Syllabus point two of *Cannellas v. McKenzie*, 160 W.Va. 431, 236 S.E.2d 327 (1977), provides: "In determining appropriate relief in habeas corpus for ineffective assistance of counsel at the appellate stage, the court should consider whether there is a probability of actual injury as a result of such ineffective assistance or alternatively, whether the injury is entirely speculative or theoretical, and where there is a probability of actual injury, the appropriate relief is discharge of the petitioner from custody."

not appointed for the Appellant for purposes of presenting these claims at the post-conviction habeas corpus stage, the Appellant's ability to access evidence and develop his claims was severely restricted, if not totally eclipsed.

The proper analysis of this matter should have included recognition and evaluation of the legal complexities involved within the issues presented by the Appellant, as a pro se petitioner. The Appellant should have been provided with the services of professional legal counsel to assist him in the development and presentation of his contention that his trial counsel had failed to adequately represent him with. While there is no bright line rule by which to judge such matters, it appears to this author that the petition presented by the Appellant was sufficient to justify the appointment of counsel for further investigation and additional preparation of the Appellant's potentially meritorious claims.

I therefore believe that the lower court abused its discretion by failing to appoint counsel for the Appellant, and I respectfully dissent to the majority's contrary holding.

I am authorized to state that Justice Starcher joins me in this dissenting opinion.