

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs.) No. 091823 (Morgan County 09-P-23)

**Christopher M. Forney,
Defendant Below, Petitioner**

FILED

September 23, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Christopher M. Forney appeals the circuit court's Order Dismissing Petition for Writ of Habeas Corpus finding two of his grounds for relief had been previously and finally adjudicated and that the third ground, ineffective assistance of habeas counsel, was not meritorious. Petitioner argues that he is entitled to a full evidentiary hearing on his instant habeas petition. The instant appeal was timely filed by the *pro se* petitioner with the entire record being designated on appeal. The Court has carefully reviewed the written arguments contained in the *pro se* petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present either a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Following a bench trial, petitioner was convicted of first degree sexual assault and first degree sexual abuse as well as contributing to the delinquency of a minor. While petitioner portrays his crimes as simply consisting of statutory rape, the victim was only eleven years old at the time and she maintained that he forcibly raped her.¹ The sexual encounters took place in petitioner's car on the same day in July 1999. He contended that the car never moved and was in Hampshire County while both encounters occurred. Based on the victim's testimony, and the statement petitioner gave to the police, the circuit court

¹ It is noted that subsequently the victim gave birth to Mr. Forney's child.

did not believe petitioner's testimony and found that one of the sexual encounters occurred in Morgan County, establishing proper venue of the case. After convicting him, the circuit court sentenced petitioner to fifteen to thirty-five years for first degree sexual assault, one to five years for first degree sexual abuse, and one year for contributing to the delinquency of a minor with the sentences running consecutively. Subsequently, the court ordered *sua sponte* that the sentences run concurrently.

Petitioner prosecuted his direct appeal where he raised the following issues: (1) Whether the circuit court erred in not granting a judgment of acquittal based upon petitioner's allegation that the State failed to prove venue; (2) Whether the circuit court erred in failing to insure that petitioner's decision to have a bench trial rather than a jury trial was a knowing and voluntary waiver; (3) Whether petitioner received the ineffective assistance of counsel at trial because his attorney failed to file a motion seeking a hearing on the voluntariness of his statement; and (4) Whether the circuit court erred in not inquiring of petitioner whether his decision to waive a hearing on the voluntariness of his statement was knowing, intelligent, and voluntary. This Court refused petitioner's appeal by an order entered on November 19, 2003.

Petitioner subsequently filed a petition for habeas corpus relief in the circuit court. Petitioner also filed motions pursuant to Rule 35(a) and (b) of the West Virginia Rules of Criminal Procedure seeking to reduce his sentence. The circuit court denied petitioner's Rule 35(a) Motion for Correction of Sentence because "all grounds and arguments raised by [petitioner] were raised on the appeal which was refused or in the habeas proceeding which also was refused, and further the Court finds them to be without any merit." The circuit court denied his Rule 35(b) Motion for Reduction of Sentence because "this Motion was received well beyond the 120 day time period within which to file such a motion for it to be considered by the Court." Furthermore, the circuit court held that even if the Rule 35(b) motion had been timely filed, it would have been denied on its merits because: (1) Even though petitioner has done well in prison and would like to be placed on probation so that he may have the opportunity to lessen the hardship the victim is enduring in her life, this does not change the fact that petitioner was, and continues to be, in need of correctional treatment that can be provided most effectively by his commitment to a correctional facility; (2) A substantial risk exists that petitioner would commit another crime during any period of probation or conditional discharge; and (3) Release, reduction of sentence, probation, or conditional discharge would unduly depreciate the seriousness of petitioner's crime. This Court refused to hear petitioner's appeals from the denial of his Rule 35(a) and (b) motions by separate orders entered on May 11, 2006, and December 6, 2006, respectively.

An omnibus hearing was held on October 28, 2004, and on December 16, 2004. Petitioner's habeas counsel was attorney Christopher Prezioso. His trial counsel, attorney

David Downs, testified at the omnibus hearing, after which the circuit court denied the habeas petition. Mr. Prezioso did not appeal the denial of relief to this Court. On December 9, 2005, petitioner filed *pro se* an original jurisdiction habeas petition in this Court “alleging ineffective assistance of counsel by Christopher Prezioso for failing to appeal Judge Sanders’s denial of habeas corpus relief.” The Court refused petitioner’s original jurisdiction petition on May 11, 2006.

In the case *sub judice*, petitioner filed a second habeas petition in the circuit court. He raised three grounds for relief: (1) Ineffective assistance of trial counsel; (2) Ineffective assistance of habeas counsel; and (3) Excessiveness of his sentence. The circuit court found that Grounds One and Three “have been previously and finally ADJUDICATED; therefore, the petitioner is barred from presenting those two same grounds in the pending petition.” On the ineffective assistance of habeas counsel, the circuit court ruled as follows:

. . . [T]he gist of the allegation against the *habeas corpus* counsel is that said counsel failed to file an appeal from the lower court’s judgment denying petitioner habeas corpus relief. The Court finds that the allegation is not substantiated for two reasons. First, the Supreme Court of Appeals of West Virginia refused the petitioner’s *pro se* habeas corpus and gave no indication that the reason why it refused said petition was due to counsel’s or the petitioner’s failure to submit the petition before [the] deadline. Second, the petitioner does not identify any misconduct or negligence which falls outside the range of professionally competent conduct committed by the counsel during his representation of the petitioner. Therefore, upon reviewing all relevant records filed, the Court concludes that the allegation of ineffective *habeas corpus* counsel is not meritorious.

Accordingly, the circuit court dismissed petitioner’s instant habeas petition. He now appeals.

On appeal, Petitioner argues that (1) there was ineffective assistance of trial counsel, (2) there was ineffective assistance of habeas counsel, and (3) his sentence was severe and excessive. “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.” Syl. Pt. 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), *cert. denied by* 424 U.S. 909 (1976). In the case *sub judice*, the circuit court found that ineffective assistance of trial counsel and the proportionality of Petitioner’s sentence “have been previously and finally ADJUDICATED; therefore, the petitioner is

barred from presenting those two same grounds in the pending petition.” Further, the circuit court concluded that petitioner failed to establish ineffective assistance of his habeas counsel. This Court finds no errors in the circuit court’s conclusions.

For the foregoing reasons, we find no error in the decision of the circuit court and the Order Dismissing Petition for Writ of Habeas Corpus is affirmed.

Affirmed.

ISSUED: September 23, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh