STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
April 18, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State *ex. rel.* Charlie Vance,
Petitioner Below, Petitioner

vs) No. 101409 (McDowell County 03-C-8-M)

Thomas McBride, Warden
Respondent Below, Respondent

MEMORANDUM DECISION

This appeal arises from the circuit court's denial of an omnibus petition for habeas corpus relief filed by petitioner, Charlie Vance. This appeal was timely filed with the entire record designated for purposes of the appeal. A timely summary response was filed by Respondent Thomas McBride, Warden. Petitioner seeks a reversal of the circuit court's decision, a vacation of his conviction, and a remand to the circuit court for a new trial.

Pursuant to 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. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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 Revised Rules.

On January 24, 2000, petitioner (petitioner below), Charlie Vance, was convicted of the first degree murder of Bradshaw Police Chief Frankie Stanton. The jury recommended mercy. Petitioner was also convicted of carrying a concealed, deadly weapon without a license. His direct criminal appeal was refused by this Court on January 23, 2002. Petitioner filed a pro se petition for a writ of habeas corpus in the circuit court on January 27, 2003. After four court-appointed attorneys withdrew from his case, his current counsel was appointed and an amended habeas petition was filed. Among the issues raised was the allegedly excessive interference by the judge during petitioner's criminal proceedings below

under the plain error doctrine. *See* Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) ("To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.")

A final omnibus habeas hearing was held before the circuit court on September 18, 2009, during which petitioner presented the testimony of five witnesses. He also entered four exhibits into evidence, including a list of the statements made by the judge during the criminal proceedings below.

On July 26, 2010, the circuit court issued a fourteen-page order denying the petition for habeas relief.[1] The only issue raised by petitioner in his petition for appeal from that order is whether, under the plain error doctrine, he is entitled to habeas relief due to the allegedly excessive interference by the trial judge. In the order denying habeas relief, the circuit court found that the questions and comments made by the judge were necessary to allow for the orderly conduct of petitioner's criminal trial. The circuit court further found that the trial judge never expressed or implied to the jury any personal belief in petitioner's guilt and that many of the judge's comments were made either at a sidebar or outside the presence of the jury. The circuit court concluded that because the facts of the case-at-bar were not like those in *State v. Thompson*, 220 W.Va. 398, 647 S.E.2d 834 (2007), which involved the excessive participation of a trial judge, the plain error doctrine was not triggered.

"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).

The Court has carefully considered the merits of petitioner's arguments as set forth in his petition for appeal, and it has reviewed the appellate record. Finding no error in the denial of habeas corpus relief, the Court affirms the decision of the circuit court and fully incorporates and adopts, herein, the circuit court's detailed order. The Clerk of Court is directed to attach a copy of the same hereto.

Affirmed.

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[1] In the amended habeas petition filed below, petitioner raised several grounds for relief, in addition to the single issue raised in his petition for appeal filed with this Court.

ISSUED: April 18, 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

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

CHARLIE VANCE PETITIONER,

VS. CASE NO: 03-C-8-M

THOMAS MCBRIDE, WARDEN RESPONDENT.

ORDER DENYING PETITIONERS WRIT OF HABEAS CORPUS

On the 18th day of September, 2009, came the petitioner, Charlie Vance, in person, and by his attorney, Edward Kohout, Esq., and also came the respondent, not in person, but by his attorney, Sidney H. Bell, Esq., Prosecuting Attorney for McDowell County, West Virginia, for an evidentiary hearing on the petitioner's Amended Petition For Habeas Corpus Relief. After several attorneys were appointed to represent the petitioner, the Court appointed Edward R. Kohout, Esq., to represent the petitioner on September 2, 2008.

The petitioner filed a post evidentiary hearing brief on October 1, 2009, only alleging as grounds for habeas corpus relief: (a) excessive participation in the trial and prejudicial comments by Judge King and (b) ineffective assistance of counsel by (i) failing to move for a change of venue; (ii) failing to move for a mistrial based on judge's comments (iii) failing to properly voir dire jurors regarding pre-trial publicity and object to the jury panel (iv) failing to object to Judge King's domination of the suppression hearing and failing to object to the ruling admitting a coerced confession into evidence (v) failing to insist on a full evidentiary hearing on petitioner's competency to stand trial and (vi) Ted White not having the experience or courtroom skills to try this case.

Therefore, the Court does not address any of the other grounds asserted because the Court

deems them to be non-meritorious.

Mr. Vance was tried and convicted of First Degree Murder with a Recommendation of Mercy and Carrying a Concealed Deadly Weapon Without License on January 24, 2000. He was found not guilty of obstructing an Officer in the Lawful Exercise and Discharge of his Official Duty. Mr. Vance was represented by the Chief Public Defender for McDowell County, Floyd A. Anderson, and Assistant Public Defender, Ted White. McDowell County Prosecuting Attorney, Sidney H. Bell, represented the State of West Virginia. On February 24, 2000, Mr. Vance was sentenced to life with mercy for his conviction of First Degree Murder and one year for his conviction of carrying a concealed weapon without a license, to be served consecutively.

The petitioner filed his appeal to the Supreme Court of Appeals of West Virginia with the Circuit Clerk of McDowell County on October 11, 2001. The petition for appeal was presented to the Supreme Court on November 5, 2001, by J. L. Hickok, Esq., and Paul R. Stone, Esq., of West Virginia Public Defender Services. As grounds for his appeal, petitioner listed as Assignments of Error: (1) The Trial Court erred by not finding that petitioner was unable to form the requisite intent to be capable of committing the felony offense of murder; (2) the Trial Court erred by not finding that petitioner's refusal to sign a waiver of his fifth amendment rights required that he have the assistance of counsel before subjecting him to further interrogation; (3) the Trial Court erred by not excluding the first confession as not having been freely and voluntarily given, but as the product of police brutality; (4) the Trial Court erred by not excluding the second confession as "Fruit of the Poisonous tree"; and (5) The Trial Court erred in not finding that the Jury's verdict was contrary to the law and evidence.

The Supreme Court of Appeals refused petitioner's Petition for Appeal on January 23, 2002,

by a vote of 5-0. Mr. Vance filed an original pro se Petition for Post Conviction Habeas Corpus Relief. Four attorneys were subsequently appointed by this Court to represent the petitioner and for various reasons were allowed to withdraw from the case prior to Edward Kohout, Esq., being appointed to represent Mr. Vance.

After reviewing the petitioner's grounds for relief, the testimony of witnesses, argument of counsel, briefs and the entire record in the case, **IT IS HEREBY ORDERED** that petitioner's Amended Petition For Habeas Corpus Relief is hereby **DENIED.**

Excessive Participation In The Trial And Prejudicial Comments By Judge King.

In his Amended Petition for Writ of Habeas Corpus Relief, Mr. Vance asserts that Judge King excessively participated in the trial and made several prejudicial comments against his defense. Petitioner's Exhibit No. 3 of his habeas corpus hearing lists ninety-one times that Judge King made comments during the trial. This Court has reviewed each comment in the context of the trial and disagrees with the petitioner's characterization and interpretation of these comments.

For instance, in Comment No. 21 petitioner complains that the Judge interrupted Mr. Anderson's cross examination to call a recess and in Comment No. 31 petitioner also complains that Judge King cut off his attorney's cross examination to call a recess. An examination of the record shows that in each case the judge was giving the jury a recess at or near the beginning of petitioner's cross examination of a witness. Judges generally give the court reporter and the jury regular breaks. This allows everyone an opportunity to use the restroom and maintain their focus. If Court has been in session for a while, or if the Court anticipates a lengthy cross examination, judges usually take a recess at the beginning or near the beginning of cross examination, so that a recess does not have to be called during the middle of cross examination or during a crucial portion of cross examination.

An examination of Comments 6, 7, 29, 55, 63, shows that the judge's comments were only to make a record for an exhibit number or to provide a distance. For example, Judge King's Comment No. 6 was, " For the record, Mr. White is indicating a distance from where he is standing to the wall of twenty-one feet, approximately."

Comment No. 29 was, "For the record, Mr. Bell has handed the witness State's Exhibit No. 1. Proceed."

Comment No. 55 was in response to Mr. Bell moving the admission into evidence States's Exhibit No. 14. There was no objection by the petitioner to this exhibit. Then Judge King said, "For the record, States's 14 is a shell casing. State Exhibit 14 is admitted into evidence in this case without objection."

Judges have an obligation to make a record that is easy to understand and is complete. Judge King was only identifying exhibits, so the reader of the record would know what exhibit was being referred to, and to provide distances to a reader of the record, who would not know the distance referred to by the witness.

Several of the comments on Petitioner's Exhibit No. 3 were either at sidebar and not heard by the jury or after the jury returned to the jury room and not in the presence of the jury. For example these are Comment Nos. 32, 33, 48, 50, 62, 66, 71, 76, 82, 89.

In Comment 89, petitioner accuses the Judge of helping the State. This is inaccurate. The judge was only trying to ascertain how to schedule the Court's time, so the Court inquired of the State if it was going to call a rebuttal witness, and actually asked the petitioner if he was going to call a surrebuttal witness. The Court acted properly in telling the State that it did not want to hear anything, only if a rebuttal witness was going to be called.

Some of the comments on Petitioner's Exhibit No. 3 are only evidentiary rulings.

Petitioner has characterized or interpreted some of the comments by the trial judge, as scolding the defense attorney or witness, but this court has reviewed these comments and disagrees with these characterizations and interpretations.

In some cases Judge King interrupted the witness to tell the witness to answer the question. This is a common practice. It is not unusual for witnesses to answer questions in such a manner so that can tell the jury what they want to, regardless of the question, and in doing so, not answer the question. Judge King was only keeping the witnesses on track. Lawyers are often not very precise in their questions, and therefore vague. In this case Judge King was not prejudicial in these interruptions.

The only interruptions that concerned this Court were Judge King's interruptions of police officers, relating to questions the Court asked in the officer's taking of statements. Judge King asked questions to ascertain the validity of Miranda warnings, which were not necessary, but not prejudicial.

The trial transcript in this case does not disclose any domination of the actual questioning of witnesses. Under Rule 614 of the West Virginia Rules of Evidence a judge has the right to ask questions as long as he does not do so in a manner that would give the jury the impression that the judge favored one of the parties.

Petitioner compares the facts of this case with those of State v. Thompson, 647 S.E.2d 834 (W.Va. 2007). In State v. Thompson, the Supreme Court held (1) where a defendant on appeal in a criminal case asserts that a trial court's questioning of witnesses and comments prejudiced the defendant's right to present evidence and jeopardized the impartiality of the jury, this Court upon

review will evaluate the entire record to determine whether the conduct of the trial has been such that jurors have been impressed with the trial judge's partiality to one side to the point that the judge's partiality became a factor in the determination of the jury so that the defendant did not receive a fair trial (syllabus point 3) and (2) a criminal defendant is entitled to an impartial and neutral judge. In a criminal trial, when a judge's conduct in questioning witnesses or making comments evidences a lack of impartiality and neutrality, or when a judge otherwise discloses that the judge has abandoned his role of impartiality and neutrality as imposed by the Sixth Amendment of the United States Constitution, we will reverse and remand the case for a new trial. (see syllabus point 7).

The comments made by Judge Kendrick King and not comparable to those in Thompson, supra. Nearly all of Judge Kendrick King's comments were more like those of Judge Charles King in State v. Farmer, 200 W. Va. 507, 490 S.E.2d 326 (1997), where the Supreme Court held that the Judge did not abuse his discretion when he questioned a key state witness in an effort to clear up apparent confusion about the dates of alleged deliveries of marijuana to him by the defendant.

Petitioner's argument that the plain error rule should apply in this case is without merit. To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus Point 7, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).The facts in this case are not like those in State v. Thompson. The trial transcript in this case does not disclose such questioning. The plain error doctrine was not triggered.

Moreover, Rule 614 of the West Virginia Rules of Evidence gives the judge discretion to ask questions as long as he does not do so in a manner that would give the jury the impression that the judge favored one of the parties. In this case, Judge King asked the witnesses questions in order to

clear up confusion, complete the record, rule on objections, and to give the witnesses time to answer the questions asked of them. His comments in the case at bar were necessary to allow for the orderly conduct of the trial. Many of his interruptions were to allow witnesses to answer questions before counsel asked another and to make sure that the witnesses understood the questions correctly.

Accordingly, petitioner's assertion that Judge King participated so excessively in this trial that the plain error rule should apply is without merit.

Petitioner also claims that Judge King made prejudicial comments against his defense. Petitioner claims that there were several instances in which Judge King made negative comments to defense counsel and defense witnesses. Petitioner claims that the Judge's explanation of the nature of the charges against the Defendant was prejudicial. An examination of the record shows that Judge King was merely informing the prospective jurors of the nature of the charges before they were asked more specific questions by counsel.

Judge King never expressed nor implied to the jurors any personal beliefs in Mr. Vance's guilt. Accordingly, Petitioner's assertion that Judge King made prejudicial comments during his explanation of the charges is without merit.

If anything, Judge King may have tried too hard to insure that the petitioner received a fair trial. This can best be demonstrated during pretrial proceedings on January 11, 2000, when Judge King went to great lengths to insure that Deputy Lash would not cause any prejudice by acting as bailiff during the case.

Ineffective Assistance of Counsel

The question in analyzing effectiveness of assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as

having produced a just result. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984).

In Strickland, supra, the United States Supreme Court adopted a test that requires a defendant who claims ineffective assistance of counsel to prove two components. The defendant must first demonstrate the deficiency of his or her counsel's performance. Defense counsel must make errors so grievous as to deprive the defendant of his Sixth Amendment right to counsel.

Secondly, the defendant must next prove that his or her counsel's actions prejudiced him or her thus denying a fair trial. This type of prejudice is only presumed if the defendant shows that his or her counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyers performance. (citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708,1719 (1980)). If this is not shown, the defendant must affirmatively show prejudice. Therefore, the appropriate test for showing prejudice is showing an existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This probability is a probability sufficient to undermine confidence in the courtroom. In its brief the State denies there was ineffective assistance of counsel.

The Court finds there was no excessive pre-trial publicity that would require defense counsel to move for a change of venue. The record contains no widespread publicity about the case. Only a few jurors had heard about the case and there was no present hostile sentiment against the petitioner extending throughout the county. See State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Voir dire in this case showed no difficulty in selecting a jury from McDowell County. On the opening day of the trial forty-five (45) prospective jurors reported for jury duty. The Court allowed

the attorneys for both the state and the petitioner to question the jury panel. Prior to voir dire by the attorneys, Judge King asked the prospective jurors if they had heard anything about the case from any source. Thirty of the jurors had heard nothing about the case. Fifteen of the jurors indicated that they had heard something about the matter. The original panel of twenty was selected from those jurors who had heard nothing about the case. The alternate jurors were then made available for the Court and the lawyers to ascertain how much or how little they knew or did not know about the case. Voir dire revealed that it was not necessary to call additional jurors in order to have a qualified jury panel. Petitioner's argument that defense counsel failed to properly voir dire the jurors relating to a change of venue is not supported by the evidence and is without merit.

Petitioner claims that defense counsel failed to object to an alleged coerced confession. During the trial, petitioner was allowed to introduce evidence of a picture of the petitioner that he was allegedly beaten after his arrest. Also, a suppression hearing was held and the judge's decision not to suppress the defendant's statements was part of the petitioner's petition for appeal to the West Virginia Supreme. Therefore, petitioners argument that defense counsel failed to object to a coerced confession is not supported by the evidence and is without merit.

Petitioner claims that defense counsel was ineffective because they failed to insist on a full evidentiary hearing, as to the defendant's competency to stand trial, and when his attorney, Mr. Anderson, asked for a full evidentiary hearing, Judge King tabled the matter. Petitioner asserts that the judge tried to talk the petitioner out of his Motion because it would delay trial and that the Judge even tried to limit the distance within a reasonable distance from the jail. This is not supported by the evidence. Furthermore, Petitioner complains that at the pretrial hearing held on January 11, 1999,

(incorrectly typed as 2000) that the Court had already made up its mind that the petitioner was competent to stand trial, as a result of the reports from Dr. Philip Robertson and Mr. Steve Ferris. This is also not supported by the evidence.

The record reveals that a pretrial hearing was scheduled to be held on January 11, 1999. The court inquired of Mr. Anderson if he had received a copy of the psychiatric evaluation from Dr. Philip B. Robertson, Psychiatrist, and the psychological evaluation from Mr. Steve Ferris. Mr. Anderson indicated that he had received both of the reports. Judge King placed on the record that both reports indicated that the defendant was competent to stand trial and asked Mr. Anderson that with regard to the receipt of the reports and the findings, conclusions and opinions stated therein, was Mr. Anderson ready to begin trial on Wednesday. Actually, Judge King stated, "Does the defendant desire to have any sort of competency hearing?" (Tr. Page 4, Lines 18, 19, 20). Judge King further stated that it would appear from the reports that the defendant was competent to stand trial and inquired as to Mr. Anderson's position.

Mr. Anderson asked the Court for an evaluation by an independent psychologist and asked for a full competency hearing. The Court further inquired if Mr. Anderson was asking for an evaluation by a psychologist and psychiatrist, or just a psychological evaluation. Mr. Anderson said he would like to have both. The Court inquired if Mr. Anderson had any experts that he would like to recommend or designate to the Court. Mr. Anderson responded that he would have that information available either the next day or Wednesday. The State had no objection to Mr. Anderson's request and the request was granted. Before granting the request, the Court asked the defendant if he understood that it would take some time in order to obtain a report and that it would delay his trial for several months and if the petitioner was agreeable to this. (This Court is convinced

that Judge King made this inquiry because of the petitioner's right to a speedy trial). Petitioner said that he was.

The Court granted petitioner a continuance and stated that in its opinion that it was fair and reasonable to grant the motion and the Court continued the January 13, 1999 trial. The Judge ruled that the evaluations must be conducted in the State of West Virginia (probably to prevent an extradition problem) and that it should be conducted within a reasonable distance from the jail (probably for security reasons).

On April 20, 1999 the defendant was examined by Dr. Mark Hughes, who conducted a competency psychiatric evaluation on behalf of the petitioner. and submitted a report. Dr. Hughes stated that at the current time, the petitioner was competent to stand trial and that he understood the charges against him. Dr. Hughes further stated that the petitioner understood the judicial process and could assist his attorney in his own defense. Dr. Hughes further stated that the apparent taking of Darvocet and Ambien with alcohol could lead to cognitive impairment and impairment in reason.

Also on April 20, 1999, Dr. John B. Todd, licensed psychologist, conducted a psychological evaluation on behalf of the petitioner and submitted a report. Dr. Todd also found that Mr. Vance was competent to stand trial and that the petitioner was able to understand various options within a court setting and that Mr. Vance was able to maintain appropriate courtroom decorum and further stated that Mr. Vance was able to trust and communicate with his attorney in a relevant and coherent manner. Dr. Todd also stated that because of medications and alcohol that put into question his responsibility at the time of the alleged crimes and probably was not a threat to others while sober.

An Order was entered rescheduling a competency hearing for November 1, 1999. On November 1, 1999, a hearing was held, however the Court does not believe that a transcript of the

hearing was ever prepared. However, an Order was entered on November 2, 1999, which indicates that both parties were ready. A hearing was held and it appeared that both parties made proffers, stipulations and claims and were allowed to argue the matters before the Court, in particular the reports of Dr. Robertson, Mr. Ferris, Dr. Todd and Dr. Hughes. It doesn't appear from the record if any, of the evaluators were called to testify, but the attorneys were allowed to argue the findings of the reports.

Therefore, petitioner is incorrect when he says Mr. Anderson never brought the subject of petitioner's competency up again. The issue was brought before the Court, and a hearing was held on November 1, 1999.

Not only was the issue brought up during the November 1, 1999, hearing, but the petitioner presented Dr. Antonio Dy to testify on his behalf and was able to have the Court instruct the jury about his inability to form the necessary intent or the necessary state of mind to commit the crimes charged because he was so intoxicated or so under the influence of drugs or the combination of both. See Transcript pages 1056-1058 for instruction in Court Charge.

The facts in this case are distinct from those in State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976). However, this case is consistent with State v. Scholfield, 175 W.Va. 331 S.E.2d 829 (1985).

In Scholfield, the Court noted the unanimity contained in the medical reports relating to the defendant in that case. In fact, the Court actually said, " As such our holding in State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976) is inapplicable. In Milam, supra, this Court held that a failure to grant the competency hearing was reversible error when psychiatrists reasonably differed as to the appellant's competency."

The petitioner's case is like Scholfield, supra. In this case all four reports agreed that Mr. Vance was competent to stand trial. Therefore, Petitioners argument that his counsel was ineffective because there was no full evidentiary hearing is without merit.

Petitioner also claims ineffective assistance of counsel because defense counsel Ted White did not have the courtroom skills or experience to try this case. However, the record shows that Mr. White was fully prepared and zealous in his representation of the petitioner. Mr. Vance was actually found not guilty in one of the three charges. Also, Mr. White was assisting the Chief Public Defender, Floyd Anderson.

Any acts or omissions to act on the part of Mr. Vance's trial attorneys as set forth in his brief can be viewed as trial tactics taken by professional attorneys. Even if Mr. Vance could prove serious errors taken by his trial counsel, he still has the burden to affirmatively show prejudice (the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different) under the two-pronged Strickland test. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Therefore, Mr. Vance has to prove that had it not been for the errors committed by his counsel, the outcome of the trial would have been in his favor.

It becomes a question of whether there is a reasonable probability that the jury would have acquitted Mr. Vance, but for errors of his trial counsel. In this case, the answer to that question is no. Even if defense counsel committed serious errors, these errors were not so serious as to prejudice Mr. Vance in denying him a fair trial. In this case, the State had enough evidence to convict Mr. Vance of First Degree Murder and Carrying a Concealed Weapon beyond a reasonable doubt. Reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

The State's evidence was that Mr. Vance pulled a gun from a bag that he was wearing and shot and killed Bradshaw City Police Officer, Chloe Frances Stanton in August 1998 in front of witnesses at the Bradshaw City Town Hall and then left the scene. This is an example of the overwhelming evidence pointing toward Mr. Vance's guilt of First Degree Murder and Carrying a Concealed Weapon.

Any errors made by petitioner's trial counsel could not have possibly affected the finding in the case, and Mr. Vance was not prejudiced by any errors because the outcome of the trial would have been the same absent any errors. The State had enough evidence to convict Mr. Vance of First Degree Murder and Carrying a Concealed Weapon. Overall, Mr. Vance has failed to prove that defense counsel was ineffective in his defense, because he has failed to prove that he was so prejudiced as to having been denied a fair trial.

Therefore, based on the foregoing, the Court is of the opinion that all the Petitioner's grounds are without merit and taking into consideration the totality of circumstances, the Court does hereby **DENY** Charlie Vance's Amended Petition for Writ of Habeas Corpus in total and it is so **ORDERED**, all to which Petitioner excepts and objects.

The Clerk of this Court is directed to forward a copy of this Order to Sidney H. Bell, Prosecutor of McDowell County, at 93 Wyoming Street Suite 207, Welch, West Virginia 24801, and Charlie Jarrell Vance by depositing said copy into the United States mail, postage prepaid, addressed to his attorney, Edward R. Kohout, Counsel for the Petitioner, at 2567 University Avenue 2001, Morgantown, West Virginia 2650.

Enter this 26th day of July, 2010.

Rudolph J. Murensky II

RUDOLPH J. MURENSKY, II

A TRUE COPY TESTE
FRANCINE SPENCER, CLERK
BY