STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Tex Gene Holbrook,
Petitioner Below, Petitioner

vs.) **No. 101437** (Fayette County 10-C-266)

David Ballard, Warden, Mt. Olive Correctional Complex, Respondent Below, Respondent

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Tex Gene Holbrook appeals the circuit court's order dismissing his instant petition for a writ of habeas corpus without a hearing. Petitioner argues that the case should be remanded for a hearing on his 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 petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case 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 petition, and the certified record, the Court determines that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In a one-page order entered on October 14, 2010, the circuit court ruled as follows:

> On October 8, 2010, the above-named inmate-Petitioner, pro se, filed yet another habeas corpus petition.
>
> The aforementioned Inmate has already had an omnibus habeas corpus hearing which resulted in an Order which denied the requested writ. The Supreme Court of Appeals of West Virginia refused the Inmate's Petition for Appeal of the aforementioned adverse filing.
>
> Under the laws of the State of West Virginia the Inmate-Petitioner is entitled to only one (1) omnibus habeas corpus hearing, and he has had said hearing.

> Accordingly, it is ORDERED that the above-styled civil action be and the same is hereby DISMISSED.

The circuit court did not make specific findings of fact and conclusions of law regarding the grounds of relief petitioner raised in his instant petition for a writ of habeas corpus.

In his petition for appeal, petitioner indicates that his prior habeas petition was denied "[u]pon hearing." During the omnibus hearing, he was represented by James Adkins. Petitioner's previous habeas appeal was refused by this Court by an order entered on September 9, 2010. His habeas appellate counsel was Christopher Charles Ross.

Petitioner stands convicted of multiple felony sexual offenses against his wife's minor granddaughter. The petition for appeal indicates that he was originally indicted on sixty-nine charges but that forty-two of the charges were dismissed on the State's motion. Of the twenty-seven remaining charges, petitioner was convicted on twenty-four of them. Specifically, he was convicted on eight counts of incest, eight counts of sexual assault in the second degree, and eight counts of sexual abuse by a parent, guardian, or custodian.[1]

Petitioner argues that the indictment against him was flawed. Petitioner further argues that Mr. Adkins was ineffective as habeas counsel and that Mr. Ross was ineffective as habeas appellate counsel. Petitioner argues that "an applicant may still petition the court on the court on the following grounds: ineffective [a]ssistance of [c]ounsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change of law favorable to the applicant, which may be applied retroactively."

ALLEGED FLAWS IN THE INDICTMENT

Petitioner argues that there were flaws in his indictment of a constitutional magnitude. More specifically, petitioner says his indictment was flawed because "there was a chronological recitation of the identical charges, by threes." He argues that for each instance of alleged sexual misconduct, the State improperly charged him with three separate crimes. The legislature has determined that incest, second degree sexual assault, and sexual abuse by a parent, guardian, or custodian constitute separate offenses, and, therefore, petitioner has not demonstrated that the indictment was flawed. This issue is without merit.

INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL

[1] Petitioner was sentenced to five to fifteen years for each of the eight incest counts, ten to twenty-five years for each of the eight second degree sexual assault counts, and ten to twenty years for each of the eight sexual abuse by a parent, guardian, or custodian counts, with the sentences to run consecutively.

Petitioner argues that Mr. Adkins and Mr. Ross provided ineffective assistance in the prior habeas proceeding and that the issue of ineffective assistance of habeas counsel may be raised in a successive habeas petition. "A prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing . . . ." Syl. Pt. 4, in part, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). In West Virginia, claims of ineffective assistance of counsel are 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. *See* Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). After careful consideration, this Court concludes that petitioner's claims against his habeas counsel and his habeas appellate counsel do not meet the *Strickland/Miller* standard for establishing ineffective assistance of counsel.[2]

For the foregoing reasons, we find no error in the decision of the circuit court and its dismissal of petitioner's petition for a writ of habeas corpus is affirmed.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

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

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[2] While West Virginia Code §53-4A-7(c) requires a circuit court denying relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each ground advanced by the petitioner, a remand for such findings is not always required. *See, e.g., State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W.Va. 11, 19, 528 S.E.2d 207, 215 (1999) ("While in most circumstances the failure to make specific findings of fact and conclusions of law regarding an issue raised in habeas proceedings would necessitate a remand, we need not take such action in the present case.").