

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

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

vs) No. 101520 (Kanawha County 06-F-444)

**Thomas L. Brown,
Defendant Below, Petitioner**

FILED

June 15, 2011

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

MEMORANDUM DECISION

Petitioner appeals from his convictions for nighttime burglary, battery, first degree robbery, and two counts of second degree robbery. He seeks a reversal of his convictions and a remand for a new trial. A timely summary response has been filed by the State of West Virginia.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on February 23, 2011. 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.

Petitioner was found guilty of nighttime burglary, battery, first degree robbery, and two counts of second degree robbery following a jury trial. The charges arose out of an incident that occurred in December of 2005, when petitioner kicked down the door of an apartment and robbed several of the occupants using a gun to threaten them. He also struck one of the victims in the head with the gun causing it to discharge.

The trial court sentenced petitioner to eighty years in prison for the first degree robbery conviction. His remaining prison sentences, all of which were ordered to run concurrently with his sentence for the first degree robbery conviction, are as follows: one to fifteen years for the nighttime burglary conviction; twelve months for the battery conviction; and five to eighteen years on each of the second degree robbery convictions. Petitioner was subsequently re-sentenced for purposes of filing a petition for appeal, and appellate counsel was appointed to represent him.

I. Ineffective Assistance of Counsel

Petitioner asserts that his trial counsel was ineffective when he (1) failed to object to Corporal Elliott, the investigating officer, sitting at the prosecutor's table at trial given the trial court's prior sequestration order; (2) failed to effectively cross-examine Corporal Elliott concerning crime scene evidence; and (3) failed to retain an expert witness to impeach one of the victims concerning whether her use of crack cocaine impacted her ability to properly identify petitioner. Petitioner adds that his trial counsel was ineffective when he introduced petitioner's prior crime at trial. The State responds that whether petitioner's trial counsel was ineffective is premature because the issue was not raised below, therefore, there is no factual record from which this Court can properly determine the issue.

Generally, a claim of ineffective assistance of counsel is not ripe for direct appellate review. *State v. Miller*, 194 W.Va. 3, 14, 459 S.E.2d 114, 125 (1995); *State v. Hutchinson*, 215 W.Va. 313, 323, 599 S.E.2d 736, 746 (2004) (per curiam). The Court has also stated that it is the "extremely rare" case when the Court will find ineffective assistance of counsel on direct appeal. Syl. Pt. 10, in part, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Based on the record before this Court, it is impossible to determine why petitioner's trial counsel proceeded in the manner in which he did. As we stated in *Triplett*, such issues should be developed in a habeas proceeding. *Id.* We express no opinion on the merits of petitioner's ineffective assistance claims or of any habeas petition.

II. Jury

Petitioner next asserts that the trial court's jury selection process systematically excluded African-Americans and was not based upon a fair cross-section of the community, which deprived him of his rights to equal protection and due process under the state and federal constitutions. Petitioner's appellate counsel states that his post-trial research revealed serious under-representation of the African-American community in petitioner's jury panel. Petitioner adds that the State struck one of the three African-Americans on the panel for what appears to have been no reason other than race. This potential juror had been a crime victim and had a family member who was a convicted criminal, but so had other members of the panel who were not struck.

The State responds that the trial court considered petitioner's objection to the jury panel noting that the jury pool was randomly selected and did not reflect any "systematic exclusion" of any specific juror. The State adds that information elicited during voir dire showed significant differences between the African-American juror whom the State struck and other jurors who remained on the panel. The State also notes that petitioner's trial counsel neither objected to the African-American juror being struck nor asked the State to set forth a reason for the strike.

Based upon the arguments of counsel and the record before the Court, we cannot state that there was any error in the composition of petitioner's jury.

III. Sequestration of Witnesses at Trial

Lastly, petitioner asserts that he was prejudiced and that the trial court's sequestration order was violated when two of the victims, who were witnesses at trial, communicated with each other about potential cross-examination questions and when Corporal Elliott was allowed to sit at the prosecutor's table. It appears from the trial transcript that petitioner's trial counsel did not raise the issue with the trial court when one of the victims testified during her cross-examination that she had spoken with another victim who had already testified. Further, petitioner concedes that his trial counsel failed to object to Corporal Elliott sitting at the prosecutor's table during trial. As we stated previously, based on the record before the Court, it is impossible to determine why petitioner's trial counsel proceeded in the manner in which he did. Such issues should be developed in a habeas proceeding, although we express no opinion on the merits of any habeas petition.

IV. Conclusion

Having reviewed the record and the parties' arguments on appeal, this Court finds no error below. Accordingly, we affirm.

Affirmed.

ISSUED: June 15, 2011

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum

NOT PARTICIPATING:

Chief Justice Margaret L. Workman