

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

**State ex rel. Lucas Lynn McVay,
Petitioner Below, Respondent**

vs) No. 11-0354 (Upshur County 07-P-20)

**Thomas McBride, Warden,
Respondent Below, Respondent**

FILED

June 22, 2012

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

MEMORANDUM DECISION

Petitioner Lucas Lynn McVay, by counsel, David L. Orndorff, appeals from the Circuit Court of Upshur County's order entered January 26, 2011, denying his petition for post-conviction habeas corpus relief. The State of West Virginia, by counsel, Thomas W. Rodd, has filed its response on behalf of respondent, Warden Thomas McBride. Petitioner seeks reversal of his conviction, or, in the alternative, asks the Court to reduce his sentence or to order a new trial in the underlying criminal case.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 of Appellate Procedure.

On December 14, 2004, petitioner and James Butcher broke into the home of eighty-two-year-old George Meixner for the purpose of stealing money and property that they could use to buy or trade for drugs. Mr. Meixner was assaulted during the burglary and died as a result of his injuries. In October of 2005, James Butcher plead guilty to first-degree (felony) murder and robbery. At his plea hearing, Mr. Butcher testified that he and petitioner had entered Mr. Meixner's home through a back door, that petitioner had repeatedly hit Mr. Meixner in the head with a shovel, and that while he and petitioner searched Mr. Meixner's home for items to steal, Mr. Meixner had stopped breathing.

At petitioner's 2006 trial, petitioner testified that he never entered Mr. Meixner's house and that he simply helped Mr. Butcher carry stolen items away from the house. Petitioner also denied knowing that Mr. Meixner had been harmed. The jury found petitioner guilty of first degree (felony) murder, first degree robbery, and two counts of conspiracy. Petitioner was sentenced to life with mercy for the felony murder conviction; eighty years in prison for the robbery conviction to run consecutively to the murder sentence; and two concurrent terms of one to five years in prison each

for the conspiracy convictions to run consecutively to the murder and robbery sentences. Petitioner's direct appeal to this Court was refused on September 7, 2006.

On April 30, 2007, petitioner filed a pro se petition for habeas corpus relief. Thereafter, the circuit court appointed habeas counsel who filed a supplemental habeas petition on December 7, 2007. At petitioner's August 23, 2007, omnibus hearing on the petition, both petitioner and James Butcher testified. In a complete reversal of his testimony at his plea hearing, Mr. Butcher testified that he alone had robbed and murdered Mr. Meixner; that petitioner was not present until after the crimes were completed; that petitioner had no knowledge of Mr. Butcher's intent to rob Mr. Meixner; and that petitioner only helped Mr. Butcher move the stolen goods. Mr. Butcher also testified that he had lied in previous statements when he implicated petitioner in the robbery and murder because he was afraid to go to prison alone and wanted petitioner to go with him. As indicated above, the circuit court denied habeas relief.

Petitioner now appeals the denial of his habeas petition. "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).

Constitutionality of Felony Murder Statute

Petitioner first argues that his conviction under the felony murder statute, West Virginia Code § 61-2-1, is unconstitutional because it allows a defendant to be convicted of murder without proof of malice. This Court has squarely rejected petitioner's argument.

The crime of felony-murder in this State does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies.

Syl. Pt. 7, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978). *See also*, *State v. Wade*, 200 W.Va. 637, 646 n.8, 490 S.E.2d 724, 733 n.8 (1997)("[W]e decline to revisit an issue that has been so thoroughly addressed. Our felony-murder rule does not require malice or the intent to kill[.]")

In light of the Court's long-standing precedent, we find that petitioner's conviction under the felony murder statute was not unconstitutional for failure to prove malice and that the circuit court did not err as a matter of law in denying habeas relief on that ground.

Ineffective Assistance of Trial Counsel

Petitioner next claims that the circuit court erred in denying relief on the ground of ineffective assistance of trial counsel. Petitioner argues that his trial counsel: (a) met with him only five times prior to trial; (b) failed to interview accomplice James Butcher or call him to testify at

petitioner's trial; (c) failed to obtain petitioner's grand jury transcript; (d) erred in not objecting to an Upshur County venue for petitioner's criminal trial; (e) did not obtain a competency evaluation to determine whether petitioner was able to appreciate the consequences of his actions at the time of the crime; and (f) did not object to the trial court's consideration of Mr. Butcher's plea hearing testimony in sentencing petitioner.

In response, the Warden states that petitioner's bare allegations are unsupported by evidence. For example, regarding petitioner's claims labeled (a) and (c), petitioner failed to show any adverse consequence or that his criminal trial would have had a different result if his counsel had met with him more than five times or had obtained a copy of petitioner's grand jury transcript. Regarding claim (b), trial counsel's decision not to call James Butcher as a witness at petitioner's trial was within the range of effective assistance of counsel given that Mr. Butcher testified at his plea hearing that petitioner had repeatedly struck Mr. Meixner with a shovel and then gagged him. Concerning claim (d), petitioner's trial counsel did secure a change of venue, from Lewis County where the crime occurred, to Upshur County, due to extensive media coverage in Lewis County. Moreover, the trial court had no difficulty empaneling a jury in Upshur County. In regard to claim (e), petitioner was evaluated by a psychologist and a psychiatrist who found that petitioner was able to appreciate the wrongfulness of his behaviors and could have conformed his conduct to the requirements of the law. Finally, in regard to claim (f), – petitioner's trial counsel's failure to object to the circuit court's consideration of James Butcher's plea testimony – “‘a trial court has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed. And a sentencing court is not restricted by the federal constitution to the information received in open court.’ *Elswick v. McBride*, 623 F.Supp. 498, 504 (S.D.W.Va.1985)(citations omitted).” *State ex rel. Dunlap v. McBride*, 225 W.Va. 192, 202, 691 S.E.2d 183, 193 (2010). The Warden postulates that the circuit court would have been derelict in his duty if it had not considered the Mr. Butcher's plea hearing testimony.

In the West Virginia courts, claims of ineffective assistance of counsel are to be 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.

Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). In its order denying habeas relief, the circuit court found that although petitioner testified to these alleged errors, he produced no evidence that he was prejudiced by them. The circuit court also characterized Mr. Butcher's testimony at petitioner's omnibus hearing as “incredible.” In light of the circuit court's findings and the record on appeal, we cannot say that the circuit court abused its discretion in denying relief on the ground of ineffective assistance of counsel

Reliance on Extra-Judicial Statements

Petitioner's third assignment of error is that in sentencing petitioner, the circuit court erred in relying on Mr. Butcher's plea hearing testimony. In its order denying relief, the circuit court stated

that it took judicial notice of the fact that it accepted Mr. Butcher's plea and heard his testimony from his plea hearing. In light of this Court's ruling in *State ex rel. Dunlap v. McBride*, above, we cannot say that the circuit court abused its discretion in considering Mr. Butcher's plea hearing testimony when sentencing petitioner.

Admissibility of Telephone Call Recorded without Judicial Authority

Petitioner's fourth assignment of error is that the circuit court erred when it allowed the State to admit at trial a recording of a telephone call between a state informant, Roxie Butcher, and petitioner. Petitioner alleges that the recording should not have been admitted because the police did not have judicial authorization to record the call. In its order denying relief, the circuit court found that petitioner adduced no evidence regarding this argument. The Warden highlights that the informant was a party to the call and consented to its recording. This Court, in *State v. Williams*, 215 W.Va. 201, 207, 599 S.E.2d 624, 630 (2004), found that a taped conversation was admissible where a victim who was a party to the call with the defendant in that case consented to the interception and recording of the communication. In light of *Williams* and given that Ms. Butcher gave consent to record the call, we cannot say that the circuit court erred in admitting the recording.

Exclusion of Witnesses

Petitioner's fifth assignment of error is that the circuit court erred in denying petitioner's motion to vacate his conviction on the ground that the trial court excluded two of petitioner's non-noticed witnesses. The Warden highlights that a review of the trial record reveals that the excluded witnesses' testimony would have been cumulative to the testimony of another defense witness who was allowed to fully testify on the issue in question. The circuit court ruled that petitioner presented no evidence of prejudice by excluding the witnesses. "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds by State ex rel. R.L. Bedell*, 192 W.Va. 435, 452 S.E. 893 (1994)." Syl. Pt. 2, *State v. Doonan*, 220 W.Va. 8, 640 S.E.2d 71 (2006). Given that petitioner failed to present evidence that the excluded witnesses' testimony prejudiced him or would have made a difference in the outcome of his trial, we cannot find that the circuit court abused its discretion in excluding the witnesses.

Insufficient Evidence

Petitioner's sixth assignment of error is that the circuit court erred in finding that the State had presented sufficient evidence for the jury to convict him. The circuit court found that petitioner failed to support his assertion. The Warden highlights the following testimony from the trial transcript and concludes that if the jury found the testimony to be credible, it was sufficient to prove that petitioner and Mr. Butcher embarked on a joint venture to steal money and goods from Mr. Meixner's house and that, as they embarked on the venture, the two men attacked and killed Mr. Meixner.

Petitioner's sister Chastity McVay testified that on the evening Mr. Meixner was killed, she drove petitioner, Mr. Butcher, and Mr. Butcher's sister Roxie Butcher to a parking area near a store located in the vicinity of Mr. Meixner's house. Ms. McVay testified that petitioner and Mr. Butcher's initial plan was to steal money to buy drugs from a bread truck driver who was sleeping in this truck. However, the truck driver awoke so the men decided to steal from a nearby residence instead. Ms. McVay further testified that the men left the car and returned later with guns, beer, and money that they had obtained from Mr. Meixner's house. Ms. McVay testified that thereafter, the four drove to another location where they attempted to trade the guns for drugs, and that petitioner told the person who was looking at the guns, "We just knocked off this guy for those guns."

Roxie Butcher testified that petitioner and Mr. Butcher brought guns and money from Mr. Meixner's house to the car.

Deputy Greg Hoskins and Troopers Paul Reider and Lonnie Carpenter testified to finding Mr. Meixner's bound and gagged dead body in his home.

David Miller, a West Virginia State Police Forensic Scientist, testified that blood found on the breezeway of Mr. Meixner's home belonged to petitioner.

Medical examiner James Kaplan testified that Mr. Meixner died of blunt force injuries to his head and asphyxiation.

Glen Steffy, to whom petitioner and Mr. Butcher offered to trade the stolen guns for drugs, testified that petitioner told him that there "wasn't a problem" with the trade because "there were no witnesses." Mr. Steffy also testified that petitioner said that he had killed an old man in getting the guns, and that Mr. Butcher "couldn't do it."

Petitioner testified that he and Mr. Butcher planned to steal money or goods that they could use to buy or trade for crack cocaine, that he carried Mr. Meixner's stolen goods from the breezeway of Mr. Meixner's house to the car, and that he shared in the proceeds of the theft. Petitioner admitted that the blood on the breezeway was his and that he had cut his hand on a broken bottle while he was carrying the goods to the car. Petitioner denied having any contact with Mr. Meixner or any knowledge of the assault.

The state entered a recorded telephone conversation between petitioner and state informant Roxie Butcher during which petitioner threatened Ms. Butcher not to disclose petitioner's involvement in the robbery and murder.

"A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally,

a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 4, *State v. Haid*, 228 W.Va. 510, 721 S.E.2d 529 (2011). In light of this standard and having reviewed the record on appeal and the parties' arguments, we cannot say that the circuit court abused its discretion in denying habeas relief on the ground of insufficient evidence.

Cumulative Error

Petitioner's seventh and last assignment of error is that the cumulative effect of the circuit court's errors denied him his right to a fair trial. We concur with the circuit court that petitioner failed to meet his burden of proof on any of his assignments of error. Therefore, the circuit court did not abuse its discretion in denying petitioner's motion to vacate his conviction due to cumulative error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 2012

CONCURRED IN BY:

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