

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

**Robert Moats,
Petitioner Below, Petitioner**

vs.) No. 11-0395 (Fayette County 10-C-222)

**Brian Greenwood and John Drake,
Respondents Below, Respondents**

FILED

June 29, 2012

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

MEMORANDUM DECISION

Petitioner Robert Moats appeals the February 3, 2011, order of the Circuit Court of Fayette County denying his petition for a writ habeas corpus concerning a prison disciplinary proceeding. Petitioner argues that his alibi witness could not verify his location at the time of the incident for which he was charged with disciplinary violations when the disciplinary hearing the circuit court previously ordered the Division of Corrections [“the DOC”] to conduct a second time was held approximately seven months after the incident. Upon consideration of the standard of review, the record on appeal, and the briefs of the parties, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision is appropriate under Rule 21(d) of the Revised Rules of Appellate Procedure.

On November 29, 2008, several inmates broke into the chapel at the Mt. Olive Correctional Complex and stole the tobacco that was stored there for inmates who used it for religious purposes. In connection with this incident, petitioner was charged with disciplinary violations in Nos. MOCC-08-1051-G through MOCC-08-1055-G. Nine days after the incident, on December 8, 2008, petitioner’s original disciplinary hearing occurred.¹ He purported to have an alibi witness in the person of Correctional Officer Showwalter. Petitioner was not to allowed to call Officer Showwalter.

In Civil Action No. 09-C-139, as a result of a petition for a writ of habeas corpus filed by petitioner, the circuit court vacated petitioner’s disciplinary convictions and ordered a second disciplinary hearing, where petitioner would be allowed to call Officer Showwalter. Petitioner’s second disciplinary hearing occurred on June 18, 2009, approximately seven months after the

¹ Respondent Brian Greenwood, Correctional Hearing Officer, presided over the December 8, 2008, disciplinary hearing. Hearing Officer Greenwood was also among the respondents when Mr. Moats filed his first habeas corpus petition in Civil Action 09-C-139, along with other employees and agents of the DOC.

incident.² Officer Showwalter testified that she could not remember whether petitioner had been “on the Pod” at the time of the November 29, 2008, incident.³ Petitioner was convicted a second time, of the following disciplinary violations: Tampering with locks and/or doors; destruction of property; violation of state law; and theft of property valued under \$100.⁴

Petitioner was sentenced to sixty days of punitive segregation with loss of all privileges from December 1, 2008, to January 30, 2009, ordered to pay restitution in the amount of \$587.62, and forfeited two years of credit for good behavior.

After his disciplinary convictions following the June 18, 2009, hearing, petitioner filed a motion for reconsideration in No. 09-C-139 complaining that Officer Showwalter could not verify his location at the time of the incident when his second disciplinary hearing was held approximately seven months after the incident occurred. Petitioner also raised other issues such as the insufficiency of evidence against him. The circuit court denied petitioner’s motion for reconsideration on September 23, 2009. Petitioner did not appeal the circuit court’s decision in No. 09-C-139.

On August 19, 2009, petitioner filed a subsequent habeas corpus petition under a new case number, Civil Action No. 10-C-222, in which he again complained that Officer Showwalter could not verify his location at the time of the November 29, 2008, incident. Petitioner also incorporated by reference the arguments made in his motion for reconsideration in No. 09-C-139. By an order entered on February 3, 2011, the circuit court found petitioner’s petition in No. 10-C-222 to be frivolous, finding that “the issues presented therein were resolved by this Court’s actions and directives in Case Number 09-C-139,” and, therefore, denied the petition.

On appeal, petitioner argues that his second disciplinary hearing did nothing to remedy the due process violation he suffered at the December 8, 2008, disciplinary hearing, where he was not allowed to call his alibi witness and was, therefore, denied his only defense. The respondents argue that the West Virginia Prisoner Litigation Reform Act provides for the summary dismissal of a civil action, where the inmate’s claim for relief is one that has already been adjudicated in a previous civil action. *See* W.Va. Code §25-1A-4(b)(2). The respondents further argue that the circuit court’s decision in No. 09-C-139 was never appealed to this Court; thus, it constitutes a final judgment. The respondents argue that petitioner should not now be allowed to challenge that final judgment through an appeal in the subsequent No. 10-C-222.

² Co-respondent John Drake, Correctional Hearing Officer, presided over the June 18, 2009, disciplinary hearing. Hearing Officer Drake was named a respondent, along with Hearing Officer Greenwood, when Mr. Moats filed his instant habeas corpus petition in Civil Action No. 10-C-222.

³ A Pod is a residential living unit at Mt. Olive.

⁴ Among the evidence supporting petitioner’s disciplinary convictions were identifications of him from the security camera footage by two Correctional Officers, Sgt. Dixon and Officer Swartz. Petitioner disputes their identifications.

This Court set forth the following standard of review for appeals in habeas cases:

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). In denying petitioner's petition for a writ of habeas corpus in No. 10-C-222, the circuit court found that the issues raised in the petition had previously been resolved by the court in No. 09-C-139. Three elements must be satisfied before a second proceeding may be barred on the basis of res judicata: (1) there must have been a final adjudication on the merits in the first proceeding; (2) the second proceeding must involve the same parties, or persons in privity with those same parties, as the first proceeding; and (3) the cause of action in the second proceeding must be identical to the cause of action determined in the first proceeding or must be such that it could have been resolved, had it been presented, in the first proceeding. See Syl. Pt. 1, *Antolini v. West Virginia Division of Natural Resources*, 220 W.Va. 255, 647 S.E.2d 535 (2007) (*per curiam*) (quoting Syl. Pt. 4, *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997)).

Applying the test to the facts of this case, the Court finds first that a final adjudication on the merits occurred in No. 09-C-139 when the circuit court denied petitioner's motion for reconsideration, which denial petitioner did not appeal to this Court.

Second, in both Civil Action Nos. 09-C-139 and 10-C-222, petitioner sued the employees and agents of the DOC; therefore, the same parties were involved in both. Finally, in Civil Action No. 09-C-139, the circuit court ordered a second disciplinary hearing as a remedy to petitioner's not being allowed to call his alibi witness but petitioner later complained that the remedy afforded was inadequate. Petitioner makes the exact same complaint in No. 10-C-222. Accordingly, this Court concludes that the circuit court did not abuse its discretion in denying petitioner's habeas corpus petition in No. 10-C-222 on the ground that the issues raised in the petition were previously adjudicated in No. 09-C-139.⁵

For the foregoing reasons, we find no error in the decision of the circuit court and its denial of petitioner's petition for a writ of habeas corpus in No. 10-C-222 is affirmed.

Affirmed.

⁵ Because of this Court's disposition of this case, no need exists to address the respondents' argument that petitioner failed to properly perfect his appeal.

ISSUED: June 29, 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