

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

**Roger Persinger, Defendant Below,
Petitioner**

vs) **No. 11-0525** (Raleigh County 10-C-211-B)

**Thomas McBride, Respondent Below,
Respondent**

FILED

April 16, 2012

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Raleigh County, wherein the petitioner's petition for writ of habeas corpus seeking re-sentencing to reinstate time to appeal was denied by order entered March 4, 2011. This appeal was timely perfected by Petitioner Persinger's counsel, Robert C. Catlett, with Petitioner Persinger's appendix accompanying the petition. Respondent McBride, by Kristen Keller, filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix presented, the Court finds prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

As more fully explained herein, the Court is of the opinion that the circuit court erred in denying the petitioner's habeas corpus petition seeking re-sentencing for appeal. It is well-established law in our state that a counsel's performance that falls "outside the broad range of professionally competent assistance," falls within the realm of ineffective assistance of counsel. *See* Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). It is also well-established law that a criminal defendant has the right to petition for an appeal. Here, Petitioner Persinger's trial counsel failed to file a petition for appeal of Petitioner Persinger's conviction. Petitioner Persinger thereafter sought habeas relief through re-sentencing in order to file an appeal. Although Petitioner Persinger's habeas counsel neglected to state in his petition for habeas corpus in circuit court that Petitioner Persinger was entitled to relief due to ineffective assistance of counsel, it is clear from the Court's review of the appendix that Petitioner Persinger received ineffective assistance of trial counsel by her failure to further represent Petitioner Persinger and to file his appeal. Accordingly, this case satisfies the "limited circumstances" requirement of Rule 21(d) and it is appropriate for the Court to issue a memorandum decision rather than an opinion.

Petitioner was convicted by a jury in 2006 of several counts of sexual offense charges. The trial court subsequently sentenced the petitioner to thirty to seventy years in the state penitentiary.

Throughout this time, the petitioner was represented by the Raleigh County Public Defender's Office. After the petitioner was sentenced, his public defender timely filed a Motion for Correction and/or Reduction of Sentence. Before a hearing was held on this motion, however, the circuit court granted the petitioner's motion for substitution of counsel and substituted the Raleigh County Public Defender's Office with the Kanawha County Public Defender's Office. Accordingly, when the parties appeared on March 15, 2007, to address the pending motion to correct the petitioner's sentence, the circuit court found that it could not hear the motion when the petitioner appeared by his prior attorney, the Raleigh County Public Defender who had filed the motion. An attorney from the Kanawha County Public Defender's Office appeared at this hearing, but only in the capacity of an observer and not as counsel for the petitioner.

Following this hearing, no further action was taken in this case until May of 2008 when another Kanawha County Public Defender filed a "Motion for Hearing on Motion for Correction and/or Reduction of Sentence and the Resentencing of Defendant for Purposes of Appeal." Upon a hearing on this motion, the circuit court found that it retained jurisdiction to rule on the pending motion for reduction of sentence and directed the parties to submit briefs on the issue and directed the Public Defender to submit a diary order of the proceedings. This Public Defender never submitted either of these filings and the case continued in limbo for another year. In April of 2009, another Kanawha County Public Defender, who is also Petitioner Persinger's habeas counsel, took over the petitioner's case and made a motion to withdraw the previous motion pertaining to time served and rather, moved only for re-sentencing for purposes of filing an appeal. The circuit court found that due to the petitioner's delays in this case, it was without jurisdiction to re-sentence the petitioner and therefore denied his motion for re-sentencing.

Petitioner subsequently filed a petition for writ of habeas corpus, strictly limiting his request for relief to re-sentencing so that he could file an appeal. Petitioner did not assert ineffective assistance of counsel or denial of transcripts as a basis for habeas relief. At the hearing, Petitioner Persinger's habeas counsel admitted to the circuit court that he could not legally raise ineffective assistance of counsel because it would create a conflict within his office. In particular, habeas counsel stated to the habeas circuit court as follows:

[T]here's no other way to put it, she [Petitioner Persinger's most recent trial counsel] was negligent pursuing this case. She was ordered – she took two years to file the resentencing and she did not file a memorandum as asked. . . . However, given the circumstances . . . just as a matter of judicial economy, we are asking the [c]ourt to resentence and to just keep our office on this case. Otherwise, the next step would be someone else filing a habeas corpus on the grounds of ineffective assistance of appellate counsel, and I believe that attorney would have a watertight case given the behavior of [aforementioned counsel.]

The habeas circuit court replied, "But that's not before the [c]ourt today, is it? The ineffective assistance claim is not before the [c]ourt today?" to which habeas counsel answered, "No, that is not before. I am just raising it as an issue for the [c]ourt to consider to the issue – if the [c]ourt is wanting

to consider judicial economy in this matter, that this is going to skip several steps if he is just resentenced today.” The habeas circuit court dismissed this petition, finding that the petitioner’s sole claim for habeas relief was only based on his assertion that he was denied a right to appeal and did not make any allegation or factual basis to support this claim. It further found that the petitioner did not rebut the presumption of waiving his right to appeal pursuant to West Virginia Code § 53-4A-1, and therefore, it refused to order re-sentencing to allow time to perfect an appeal. Nevertheless, the habeas court also found that the petitioner was not precluded from an omnibus evidentiary hearing upon an amended petition for writ of habeas corpus relief. It is from this order that the petitioner appeals.

On appeal, Petitioner Persinger argues that his constitutional right to appeal cannot be destroyed by inaction of counsel or by delay in bringing this to the attention of the circuit court. He asserts that absent “extraordinary dereliction on the part of the State the appropriate remedy is not discharge but such remedial steps as will permit the effective prosecution of an appeal.” *Rhodes v. Leverette*, 160 W.Va. 781, 792, 239 S.E.2d 136, 143 (1977) (quoting Syllabus Point 2, *Carter v. Bordenkircher*, 159 W.Va. 717, 226 S.E.2d 711 (1976)). Because he does not allege extraordinary dereliction by the State, the petitioner argues that his right to re-sentencing stands. He further argues that although a trial court does not have the explicit power to re-sentence a criminal defendant, a habeas court has the power to do so under West Virginia Code § 53-4A-7(c). Under Syllabus Point 3 of *State ex rel. Burgett v. Oakley*, “[t]he writ of habeas corpus in criminal cases is not limited to use only after conviction and actual imprisonment and after the right to appeal has been exhausted or the appeal period has expired.” Syl. Pt. 3, *State ex rel. Burgett v. Oakley*, 155 W.Va. 276, 184 S.E.2d 318 (1971).

Respondent McBride contends that the fact that a petition for appeal was not filed is not evidence that the petitioner was denied of that right. His habeas petition does not allege that he was denied of the constitutional rights to a “free transcripts, appointed counsel, and the effective assistance of counsel.” *Billotti v. Dodrill*, 183 W.Va. 48, 55, 394 S.E.2d 32, 39 (1990). The petitioner does not have a constitutional right to file a petition for appeal after the prescribed time to do so has expired.

A review of the appendix reflects that Petitioner Persinger was denied his constitutional right to effective assistance of counsel. Although he did not overtly raise this constitutional ground in his petition for habeas relief, it is clear from the hearing transcripts and other submissions contained in the appendix that the petitioner’s failure to file an appeal was due to his trial counsel’s neglect to prosecute her client’s case. Petitioner is entitled to re-sentencing to reinstate his time to perfect an appeal of his trial conviction.

For the foregoing reasons, we reverse the circuit court order and remand for further proceedings consistent with this memorandum decision.

Reversed and Remanded.

ISSUED: April 16, 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