STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State of West Virginia ex rel.
Michael J. Gleason, Petitioner

v.) No. 11-0544 (Marion County 10-C-60)

George Janice, Warden,
Stevens Correctional Center,
Respondent

MEMORANDUM DECISION

The Petitioner, Michael J. Gleason, by counsel Frances C. Whiteman, appeals the Order entered by the Circuit Court of Marion County, West Virginia, on March 2, 2011, denying his petition for writ of habeas corpus. The Respondent, George Janice, Warden of Stevens Correctional Center, has filed a response by his counsel, Darrell V. McGraw, Jr., Attorney General, and Laura Young, Assistant Attorney General. The Petitioner raised five assignments of error, but the only assignment of error accepted by the Court concerns whether the circuit court erred in not reversing the Petitioner's conviction for abduction with the intent to defile inasmuch as the crime was entirely incidental and ancillary to the crime of attempted second degree sexual assault and, therefore, the conviction for abduction with the intent to defile violated the prohibition against double jeopardy and was constitutionally impermissible.[1]

[1]The remaining assignments of error were that the circuit court erred: 1) by not ruling that the Petitioner's trial counsel provided ineffective assistance of counsel; 2) by not ruling that the circuit court's late Thursday afternoon action in telling the jury that the judge would not be available on Friday coerced a divided jury to a verdict of convenience; 3) by not ruling that the State's action in showing projected graphic and bloody photographs of the alleged victim to a courtroom full of possible jurors, prior to impaneling the jury, was grounds for declaring a mistrial; and 4) by not finding that the charge of unlawful assault should have been dismissed because that charge and the charge of attempted second degree sexual assault were within one transaction and one continuing offense, sharing the same elements, and thus
(continued...)

After carefully reviewing the record provided, the briefs and oral arguments of the parties, and taking into consideration the relevant standard of review, the Court determines that the circuit court committed no error. Based on our decision that this case does not present a new question of law, a memorandum decision is appropriate under Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

On March 1, 2005, the victim was traveling in her vehicle from Clarksburg, West Virginia, back to her home in Fairmont, West Virginia, when she noticed that she was being followed by a white Pontiac Sunfire. She testified that after she returned to her apartment, there was a knock on her door, but when she answered it, no one was at the door. There was a second knock on her door and when she opened the door the second time, a male stranger was present. She tried to shut the door, but the man forced his way into her apartment. The victim stated that he grabbed her and pinned her arms. She struggled with the man and fell to the floor, hitting her head. She stated that he told her to pull down her pants. She further testified that she noticed duct tape that the man had brought with him into her apartment. She stated that she tried to open the door to her apartment, but the man had re-locked it. The victim continued to struggle with the man, but he grabbed her again. The victim fell again and hit her eye. During the struggle, which the victim stated lasted about five to ten minutes, the victim was able to grab hold of an ashtray and hit the man in the head. The man left the apartment. The victim testified that she believed that the man intended to rape her when he asked her to take down her pants. She also testified, however, that the Petitioner never touched her in a sexual manner by grabbing her genital area or breasts. The victim identified the Petitioner as her attacker. The attack left the victim with a permanent scar over her eye.

The Petitioner also testified at trial. He stated that he noticed the victim while driving on the interstate. He exited at the same exit that she did in order to use the restroom. He testified that he saw her go into a residential area and get out of her vehicle. He circled around. He remembered that she had smiled at him, so he testified that he decided to ask her out on a date. He stated that he knocked on her door twice. The Petitioner testified that she opened the door for him and he took that as an invitation to go into her apartment. He testified that he asked her if she would consider going to see a movie or to get something to eat. The Petitioner stated that she then told him she had a boyfriend. She proceeded to throw objects at him. He testified he went behind her and put his arms around her to get her to stop throwing things at him. The Petitioner testified that she must have slipped on something, because they both fell to the floor. He denied that she picked up an ashtray and struck him. He further denied that he had duct tape with him. The Petitioner testified that he noticed that

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[1](...continued)
constituted double jeopardy.

she had a mark on her face and he apologized. The Petitioner stated "[a]t that point we both got caught up, and she said to just get out and she would forget all about this."

The Petitioner was arrested and indicted by the June 2005 grand jury for the crimes of abduction with the intent to defile, burglary, attempted second degree sexual assault and unlawful wounding. The Petitioner's trial was held on July 12 and 13, 2006. At the close of the evidence, the Petitioner's counsel moved the circuit court for a directed verdict of acquittal regarding the crime of abduction with intent to defile, based upon double jeopardy principles. The Petitioner argued that convictions for both abduction with intent to defile and attempted sexual assault in the second degree were duplicitous and violated principles of double jeopardy pursuant to this Court's decision in *State v. Davis*, 180 W. Va. 357, 376 S.E.2d 563 (1988).[2] The circuit court took the matter under advisement and requested the parties to brief the issue. The jury convicted the Petitioner on all four counts in the indictment.

The circuit court held a post-trial hearing on the double jeopardy issue and by order entered January 12, 2007, the circuit court determined that

> 3. In the scenario of the instant case, this Court finds that the charges of Abduction with Intent to Defile and Attempted Sexual Assault are duplicitous and constitute a single sexual act which cannot result in multiple criminal convictions. The act of Abduction with Intent to Defile was clearly completed by Defendant, who held Victim against her will with the clear intention of sexually assaulting her. Accordingly, the conviction for Attempted Sexual Assault in the Second Degree (Count Three) must be dismissed.
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> 4. Defendant might argue that to be consistent with the holding in State v. Davis, the conviction for abduction with intent to defile (Count One) should be dismissed; however, the Davis case is distinguishable from the instant case. In Davis, the defendant was convicted of first degree sexual assault, and the offense of abduction with intent to defile was merely ancillary to the more serious offense. In the instant case, clearly the principal offense was Abduction with Intent to Defile, and the Attempted Sexual Assault in the Second Degree (emphasis supplied) was an ancillary or subordinate offense.

[2]*See infra* for a detailed discussion of *Davis*.

Thus, the circuit court reversed the Petitioner's conviction for attempted second degree sexual assault in the second degree while affirming the other three convictions.

By Order entered February 27, 2007, the Petitioner was sentenced to not less than three and not more than ten years for abduction with intent to defile, not less than one nor more than ten for burglary and not less than one nor more than five for unlawful wounding. Each sentence was to run consecutively. A final agreed amended sentencing order was entered on November 6, 2007. The Petitioner appealed to this Court and the appeal was refused 4-0 with Justice Albright not participating.

The Petitioner filed a petition for writ of habeas corpus on February 24, 2010. Evidentiary hearings were held before the circuit court on August 2, 2010, and November 30, 2010. The circuit court entered its Opinion/Final Order Denying "Petition for Writ of Habeas Corpus" on March 1, 2011. Regarding the Petitioner's double jeopardy argument in connection with the charge of abduction with intent to defile, the circuit court found that it had, "by prior order, ruled that the petitioner was properly convicted of Abduction with Intent to Defile[,]" and the Petitioner raised no new argument in the habeas corpus proceeding that caused the circuit court to "alter the reasoning behind that prior order."

In reviewing the circuit court's denial of the Petitioner's petition for habeas corpus relief, the Court uses the following standard of review:

> 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).

The Petitioner argues that the circuit court erred by not reversing the Petitioner's conviction for abduction with intent to defile[3] as the crime was incidental and

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[3]The crime of abduction with intent to defile is set forth in West Virginia Code § 61-2-14 (2010) as follows:

> (a) Any person who takes away another person, or detains another person against such person's will, with intent to marry

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ancillary to the charge of attempted second degree sexual assault.[4] The Petitioner contends

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[3](...continued)

> or defile the person, or to cause the person to be married or defiled by another person; . . . , shall be guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary not less than three nor more than ten years.

Id.

[4]The crime of sexual assault in the second degree is set forth in West Virginia Code § 61-8B-4 (2010) as follows:

> (a) A person is guilty of sexual assault in the second degree when:
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> (1) Such person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion; . . .
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> . . .
>
> (b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty-five years, or fined not less than one thousand dollars nor more than ten thousand dollars and imprisoned in the penitentiary not less than ten nor more than twenty-five years.

Id. Further, an attempt to commit a crime is set forth in West Virginia Code § 61-11-8 (2010):

> Every person who attempts to commit an offense, but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows:
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> . . .
>
> (2) If the offense attempted be punishable by imprisonment in the penitentiary for a term less than life, such person shall be guilty of a felony and, upon conviction, shall, in the discretion of the court, either be imprisoned in the penitentiary for not less than one nor more than three years, or be confined in jail not less than six nor more than twelve months, and fined not exceeding five hundred dollars.

(continued...)

that the conviction for abduction with intent to defile violated the prohibition against double jeopardy and was constitutionally impermissible. The Petitioner maintains that as a result of his motion for acquittal, the circuit court improperly concluded that the attempted sexual assault in the second degree must be dismissed rather than the charge of abduction with intent to defile. In contrast, the Respondent maintains that the circuit court correctly determined by reversing the Petitioner's conviction for attempted second degree sexual assault that it was ancillary to the offense of abduction with intent to defile.

The Petitioner's argument is predicated upon this Court's decision in *Davis*. *See* 180 W. Va. 357, 376 S.E.2d 563 (1988). In *Davis*, the defendant was convicted by a jury of the offenses of abduction with intent to defile, first-degree sexual abuse and second-degree sexual assault. *Id*. at 358, 376 S.E.2d 564. The circuit court imposed three consecutive terms of imprisonment for each of the offenses, including not less than three nor more than ten years for abduction with intent to defile, not less than one nor more than five years for sexual abuse and not less than ten nor more than twenty years for second-degree sexual assault. *Id*. at 359-60, 376 S.E.2d at 565-66. The defendant argued, in part, that the multiple sentences for all three convictions violated principles of double jeopardy. *Id*. at 360, 376 S.E.2d at 566. This Court agreed and reversed. *Id*. at 361, 376 S.E.2d at 567.

In reaching its decision, the Court first examined the criminal offenses under the following traditional double jeopardy test:

> "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Syl. pt. 8, *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983), *quoting Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Davis, 180 W. Va. at 360, 376 S.E.2d at 566 (quoting Syl. Pt. 1, *State v. Peyatt*, 173 W. Va.

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[4](...continued)
Id.

317, 315 S.E.2d 574 (1983)). The Court, in applying the *Blockburger* test, determined that

> neither of the sexual offenses charged in the indictment requires proof of detention or asportation of the victim, an essential element of the offense of abduction with intent to defile. The offense of second-degree sexual assault requires proof of sexual intercourse and the crime of first-degree sexual abuse requires proof of "sexual contact", neither of which is an essential element of the crime of abduction or of the other sexual offense. Thus, under the *Blockburger* analysis, we would appear to have three separate and distinct offenses for double jeopardy purposes.

180 W. Va. at 360, 376 S.E.2d at 566 (footnote omitted).

In *Davis*, however, the Court further recognized under the Court's decision in *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985),[5] that "where the confinement or asportation of the victim, though technically sufficient to establish the offense of kidnapping, was merely incidental or ancillary to the commission of the sexual assault, double jeopardy

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[5]Specifically, the Court held in *Miller*:

> In interpreting and applying a generally worded kidnapping statute, such as W. Va. Code, 61-2-14a, in a situation where another offense was committed, some reasonable limitations on the broad scope of kidnapping must be developed. The general rule is that a kidnapping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnapping were incidental to another crime, courts examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.

175 W. Va. at 617, 336 S.E.2d at 911, Syl. Pt. 2.

precluded separate convictions and punishments for both offenses." *Davis*, 180 W. Va. at 360, 376 S.E.2d at 566.

The Court determined that the conviction and punishment of the defendant for the crime of abduction with intent to defile violated the prohibition against double jeopardy. *Id*. at 361, 376 S.E.2d at 567. The Court reasoned that

> [t]he evidence below indicates that the detention and movement of the victim in this case was merely intended to facilitate the commission of the sexual assault. The entire transaction took no more than 15 to 30 minutes. No weapon was used to compel the detention or movement of the victim, and she was moved only a short distance inside the appellant's home. The removal of the victim to the bedroom did not appear to expose her to an increased risk of harm beyond that inherent in the sexual assault or to decrease the possibility of detection or escape. In these circumstances, we must conclude that the "abduction" of the victim was merely incidental or ancillary to the commission of another offense.

Id.

In the case sub judice, the circuit court correctly distinguished the *Davis* decision and determined that the abduction with intent to defile was the principle offense that was completed by the Petitioner. Therefore, the circuit court found that the attempted sexual assault in the second degree was the ancillary or incidental offense. We agree with the circuit court's decision. Further, unlike the *Davis* case, the Petitioner in this case has only been convicted of one crime. When the circuit court reversed the Petitioner's conviction for attempted sexual assault in the second degree, any possible double jeopardy violation was avoided.

Based on the foregoing reasons, we conclude that the circuit court did not err in denying the Petitioner's petition for writ of habeas corpus. The decision of the circuit court, therefore, is affirmed.

Affirmed.

ISSUED: June 7, 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