

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

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

vs) No. 11-0554 (Monroe County 10-F-11)

**Roger Dale Carter,
Defendant Below, Petitioner**

FILED
October 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Roger Dale Carter appeals his conviction of unlawful assault upon a guilty plea, after he was sentenced to serve one to five years. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition. The State filed a timely response.

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 May 31, 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 herein was indicted on a charge of malicious wounding after hitting another man with a claw hammer. Both petitioner and the victim were charged with crimes for the violent altercation which resulted in hospitalization for both men. The altercation apparently arose from a drug deal. Petitioner eventually pled guilty to unlawful assault. During the plea hearing, the circuit court specifically told petitioner twice that the penalty for unlawful assault was one to five years in the penitentiary. Petitioner was then sentenced to one to five years for unlawful assault. The State remained silent during sentencing as per the plea agreement, while the petitioner argued for an alternative sentence. The circuit court noted a long history of arrests and convictions dating back at least two decades. The circuit court therefore denied petitioner's motion for an alternative sentence.

On appeal, petitioner argues that his plea agreement was not valid. He argues that he was not the aggressor in the incident; that he did not fully understand the plea agreement; that the prosecutor and judge had previously represented him but his counsel failed to move for recusal; and that he suffers from diminished capacity and could not independently make important decisions. As to his argument that he was not the aggressor in the incident, this argument is negated by his guilty plea, as he was informed by the circuit court during his plea hearing that he gave up his right to any defenses he may have had by pleading guilty. Further, the record shows that the circuit court informed him of the possible punishment for his crime, and petitioner acknowledged his understanding of the plea agreement on the record. There is no evidence of his alleged diminished capacity in the record. Therefore, this Court finds that the plea agreement is valid.

Petitioner's argument that the prosecutor and judge had previously represented him but prior counsel failed to move for recusal, and his related argument regarding whether his counsel should have sought a competency evaluation are more appropriate for a habeas corpus proceeding. As recognized in *State v. Frye*, 221 W.Va. 154, 155-56, 650 S.E.2d 574, 575-76 (2006), when an issue of ineffective assistance of counsel has been presented for the first time on appeal rather than the preferred method of seeking relief through a habeas corpus proceeding, and the Court lacks rulings from the circuit court to provide a basis for such review, the applicable standard of review is found in Syllabus Point Five of *State v. Miller*, 194 W.Va. 3, 459 S.E. 2d 114 (1995):

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 (1996).

In the case-at-bar, there is no evidence regarding the possible conflict of the judge and prosecutor, nor is there evidence regarding why a competency evaluation was not sought. This Court has recognized that “it is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal.” *State v. Miller*, 194 W.Va. 3, 14, 459 S.E.2d 114, 125 (quoting *State v. Triplett*, 187 W.Va. 760, 771, 421 S.E.2d 511, 522 (1992)). As the Court explained in *State v. Miller*, this is due to the undeveloped state of the record:

The very nature of an ineffective assistance of counsel claim demonstrates the

inappropriateness of review on direct appeal. To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies.

194 W.Va. at 15, 459 S.E.2d at 126. This Court has held that:

An incarcerated individual who raises an issue on direct appeal that was not the subject of a previous petition seeking post-conviction relief under West Virginia Code § 53-4A-1 (1967) (Repl.Vol.2000) is not prohibited from seeking habeas corpus relief following the issuance of an opinion by the West Virginia Supreme Court of Appeals where the decision on the appeal does not contain any ruling on the merits of the issue, as no final adjudication within the meaning of West Virginia Code § 53-4A-1 has resulted.

Syl. Pt. 4, *State v. Frye*, 221 W.Va. 154, 650 S.E.2d 574 (2006). In the case-at-bar, the Court concludes that the record is not properly developed to permit review of this issue on its merits. Therefore, because this Court declines to address the merits of petitioner's ineffective assistance of counsel claim regarding the possible conflicts of the judge and/or prosecutor and the failure to request a competency evaluation, relief in the form of habeas corpus is not barred under the provisions of West Virginia Code § 53-4A-1 as the result of petitioner's having instituted a direct appeal raising the issue.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 25, 2011

CONCURRED IN BY:

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