STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Richard B. McNemar,
Petitioner Below, Petitioner

vs.) No. 11-0606 (Harrison County 09-C-378-3)

David Ballard, Warden, Mt. Olive Correctional Complex, Respondent Below, Respondent

FILED
November 30, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Richard B. McNemar appeals the July 1, 2010 order of the Circuit Court of Harrison County denying his petition for a writ of habeas corpus following an omnibus hearing. Petitioner raises a number of issues in arguing that the circuit court erred in denying him habeas relief. The instant appeal was timely filed by the petitioner with the entire record being designated on appeal. The Court has carefully reviewed the record and the written arguments contained in the petition and the response thereto, and the case is mature for consideration.

This matter has been treated and considered under the Revised Rules of Appellate Procedure. This Court has considered the parties' briefs and the record on appeal. 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 prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules..

During the May 2008 term of court, the Grand Jury of Harrison County indicted petitioner on four counts of sexual abuse in the first degree; five counts of sexual abuse by a parent, guardian, custodian, or a person in a position of trust; and one count of sexual abuse in the first degree. The charges against petitioner involved O.G., the granddaughter of his girlfriend Carol G.

Petitioner's trial began on July 28, 2008. His trial counsel was attorney Wiley Newbold. On July 29, 2008, the jury convicted petitioner of one count of sexual abuse by a parent, guardian, custodian, or a person in a position of trust and one count of sexual abuse in the first degree. The circuit court sentenced petitioner to one to five years in the state penitentiary for the one count of sexual abuse by a parent, guardian, custodian, or a person in a position of trust and to ten to twenty years for the one count of sexual abuse in the first degree. The circuit court

ordered the sentences to run concurrently. Petitioner's post-trial motions for a new trial and for judgment of acquittal were denied on September 19, 2008, following a hearing on September 11, 2008.

On August 21, 2009, petitioner filed a petition for a writ of habeas corpus. The respondent warden filed a response to the petition on September 21, 2009. On December 22, 2009, petitioner, through habeas counsel Thomas G. Dyer, filed an amended petition for a writ of habeas corpus and a *Losh* checklist waiving thirty-seven grounds for relief and wishing to proceed on fifteen grounds. The respondent warden filed his response to the amended petition for a writ of habeas corpus on March 30, 2010.

The circuit court conducted petitioner's omnibus habeas corpus hearing on March 31, 2010, and April 1, 2010, at which petitioner with his counsel confirmed that the waiver of thirty-seven grounds on the *Losh* checklist. Petitioner appeared through video conference, while Mr. Dyer appeared in person. The respondent warden appeared by counsel. Trial counsel Mr. Newbold, as well as Capt. James Merrill and Cpl. Steven Swiger, testified at the hearing.

Following the hearing, the circuit court denied petitioner's amended petition for a writ of habeas corpus by an order entered on July 1, 2010. The circuit court's thirty-one page order addressed each of the fifteen grounds petitioner did not waive on his *Losh* checklist. Petitioner now appeals.

STANDARD OF REVIEW

This Court set forth the governing standard of review in Syllabus Point One, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006):

> 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.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

As his first assignment of error, petitioner asserts that Mr. Newbold did not provide effective assistance as trial counsel. In order to establish ineffective assistance, pursuant to Syllabus Point Five, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), petitioner must establish (a) Mr. Newbold's performance was deficient under an objective standard of reasonableness and (b) there is a reasonable probability that but for Mr. Newbold's unprofessional errors, the result of the proceedings would have been different. Petitioner raises on appeal five instances where he says Mr. Newbold's performance was deficient: (1) Mr.

Newbold failed to interview the child advocate who interviewed O.G. and failed to call the child advocate as a witness at trial; (2) Mr. Newbold failed to impeach O.G. with prior inconsistent statements; (3) Mr. Newbold failed to ensure that O.G. was available to be called as a defense rebuttal witness so that her testimony could be impeached; (4) Mr. Newbold failed to consult or retain an expert regarding the effect of the medication Lorcet on petitioner's statements to the police; and (5) Mr. Newbold failed to have petitioner evaluated by an expert regarding his childhood sexual abuse and the role it played in his statements to the police in the case sub judice. The respondent warden disputes that any of these instances constituted ineffective assistance of counsel. In addition, as previously noted, Mr. Newbold testified in petitioner's omnibus habeas corpus hearing. Thereafter, the circuit court found Mr. Newbold's performance satisfied an objective standard of reasonableness and denied petitioner habeas relief on his claims of ineffective assistance. After careful consideration, this Court finds that the circuit court did not abuse its discretion.

VOLUNTARINESS OF PETITIONER'S STATEMENTS TO THE POLICE

Petitioner asserts his statements to the police were involuntary because he was under the influence of Lorcet and made an implied request for counsel. Capt. Merrill and Cpl. Swiger testified at petitioner's omnibus hearing. They said they assessed petitioner and found nothing to indicate that he was under the influence of any substance or alcohol. Cpl. Swiger indicated that petitioner asked him whether it would be in his best interest to get an attorney but that he never requested an attorney. The respondent warden argues that petitioner's asking whether he should have an attorney is not the same as actually requesting that he have one. *See Davis v. United States*, 512 U.S. 452 (1994) (finding that "Maybe I should talk to a lawyer" did not constitute a request for counsel). Furthermore, petitioner continued to talk to the police. Both Cpl. Swiger and Sgt. Merrill testified that petitioner never made a request for an attorney and that if he had requested an attorney, the interrogation would have stopped. The circuit court found that "petitioner has not established by a preponderance of the evidence that he took Lorcets during the breaks in the interrogation and that this medication affected the voluntariness of his confession" and that "petitioner has not established by a preponderance of the evidence that he requested counsel during the interrogation." After careful consideration, this Court concludes that the circuit court's findings are not clearly erroneous and that the circuit court did not abuse its discretion in denying petitioner habeas relief on this ground.

SUFFICIENCY OF THE EVIDENCE

Petitioner alleges that the evidence was insufficient to support a jury verdict on the two charges for which he was convicted, he argues that his police statements should have been suppressed and that the jury was unwilling to believe the victim's testimony without corroboration. The circuit court denied petitioner's motion to suppress the statements during a pre-trial hearing. As previously discussed, petitioner's statements to the police were voluntary; therefore, it did not constitute error for the circuit court not to suppress the statements. The respondent warden further argues that even if petitioner's police statements were not considered,

O.G.'s testimony alone would be sufficient to convict petitioner of one count of sexual abuse by a parent, guardian, custodian, or a person in a position of trust and one count of sexual abuse in the first degree. *See* Syl. Pt. 5, *State v. Beck*, 167 W.Va. 830, 2186 S.E.2d 234 (1981) ("A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury.").

In the habeas proceeding, the circuit court found that there was sufficient evidence presented at trial "upon which the jury could find petitioner guilty in that evidence was presented on all elements of sexual abuse in the first degree and sexual abuse by a parent, guardian, custodian, or a person in a position of trust." After careful consideration, this Court concludes that these findings are not clearly erroneous and that the circuit court did not abuse its discretion in denying petitioner habeas relief on this ground.

PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS

During closing arguments the prosecutor made the following comments:

> [O.G.] has nothing to gain in this. . . . There's nothing that she would gain by coming in here and saying anything other than the truth to you. . . . Then when you look at the defendant's testimony today, look at what interest he has in it. Look at what interest [Carol G., O.G.'s grandmother and petitioner's girlfriend,] has in what she had to say. What interest his sister . . . had in this.

Petitioner asserts that these comments misled the jury and prejudiced him in that the prosecutor basically stated that petitioner and his witnesses lied and that O.G. told the truth. The respondent warden asserts that the prosecutor never made a characterization of petitioner's statements and that the prosecutor merely asked the jury to think about the interests involved in the case. The circuit court concluded that "[n]o evidence has been presented to show that this statement clearly prejudiced petitioner" and that in considering the four factors from Syllabus Point Six, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995), "it is unlikely that the [prosecutor's] remark misled the jury, this was one isolated comment, the proof which led to petitioner's conviction carried a great deal of weight, and it is unlikely that the comment was made to divert the jury's attention." After careful consideration, this Court concludes that the circuit court did not abuse its discretion in denying petitioner habeas relief on this ground.

RELEVANCY OF PETITIONER'S TESTIMONY ABOUT HIS OWN ALLEGED SEXUAL ABUSE

Petitioner states that he wanted to testify about his own childhood experience of suffering sexual abuse because it was critical to show that in his statements to the police, he conflated his victimization as a child with what O.G. alleged happened to her in the case sub judice. At trial, the circuit court heard arguments regarding the relevancy of petitioner's testimony about his

alleged history of suffering sexual abuse as a child. The circuit court concluded that there was no relevancy to that line of inquiry and limited petitioner's testimony sustaining the State's objection. The respondent warden further notes that petitioner was not limited in his ability to testify about the facts of the incidents for which he was charged. In the habeas proceeding, the circuit court concluded that it was "not a Constitutional error to find questions pertaining to petitioner's alleged childhood sexual
abuse to be irrelevant." This Court concludes that the circuit court did not abuse its discretion in denying petitioner habeas relief on this ground.

INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL

Petitioner asserts that Mr. Dyer did not provide him with effective assistance in the instant habeas corpus proceeding. "'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syl. Pt. 2, *Sands v. Security Trust Company*, 143 W.Va. 522, 102 S.E.2d 733 (1958)." Syl. Pt. 4, *State v. Redman*, 213 W.Va. 175, 578 S.E.2d 369 (2003). Petitioner is raising Mr. Dyer's alleged ineffective assistance for the first time on appeal, in the same habeas corpus proceeding where Mr. Dyer represented him in the circuit court. If petitioner continues to believe Mr. Dyer was ineffective, the preferred way of raising ineffective assistance of habeas counsel is to file a subsequent petition for a writ of habeas corpus raising this issue in the4 court below. *See* Syl. Pt. 4, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981) (While a prior habeas corpus hearing is res judicata as to all matters either raised or should have been raised at the habeas corpus hearing, "an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; . . . ."). Because the circuit court had no opportunity to decide the issue of Mr. Dyer's alleged ineffective assistance, this Court will not pass on the issue in the first instance.

CONCLUSION

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

Affirmed.

ISSUED: November 30, 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