

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

**Terry Humphrey,
Petitioner Below, Petitioner**

vs.) No. 11-0641 (Fayette County 11-C-2-H)

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

FILED

June 8, 2012

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

MEMORANDUM DECISION

Petitioner Terry Humphrey appeals the circuit court's January 7, 2011, order denying his seventh petition for a writ of habeas corpus. The Warden filed a summary response on April 25, 2011, to which petitioner has filed a reply. After carefully reviewing the record provided, the briefs of the parties, and taking into consideration the relevant standard of review, the Court determines that the circuit court committed no error in denying petitioner's petition. The Court further finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

Petitioner was indicted in May of 1984 for the crime of murder. There was a robbery attempt with evidence providing that Odell Washington, the victim, had been confronted outside of his store and that items he had with him were subsequently missing. Mr. Washington was shot once in the chest in the alley beside his grocery store. After being shot, he managed to walk to the front of the store where he collapsed and died from the shotgun wound. His body was discovered soon thereafter.

On the following day, Hudon Nicholes went to the State Police headquarters in Oak Hill and related that in a conversation he had with petitioner prior to the shooting, petitioner admitted waiting outside of Mr. Washington's store on a prior occasion with the intent to rob him, but did not do so at that time. Mr. Nicholes agreed to aid the State Police in their investigation of the shooting by meeting with petitioner while wearing a transmitting device that allowed the State Police to listen and record their conversation. In the course of one of these tape-recorded discussions with petitioner, petitioner again mentioned to Mr. Nicholes that a few days prior to the shooting, he had gone down to Mr. Washington's store with a butcher knife to rob him, but for some reason changed his mind.

Petitioner initially denied involvement in the shooting of Mr. Washington. However, when he was confronted with the information supplied to the State Police by Mr. Nicholes, petitioner gave a written confession. He was subsequently convicted of felony murder and sentenced to life without mercy. Petitioner filed a direct appeal, and this Court affirmed his conviction in *State of West*

Virginia v. Humphrey, 177 W.Va. 264, 351 S.E.2d 613 (1986), finding that petitioner’s written confession had been properly admitted.

Petitioner then filed a series of six petitions for a writ of habeas corpus from 1985 through 1993, the first five of which were summarily denied. After the sixth habeas petition was filed, five different attorneys were appointed over thirteen years to represent petitioner on a claim that trial counsel, James C. Blankenship, III, had been ineffective when he failed to argue for mercy and failed to object to the State’s closing argument. An amended petition for a writ of habeas corpus was filed on October 17, 2005, along with a *Losh* checklist. The issues on the *Losh* checklist that were not subsequently argued were waived at the omnibus hearing on April 6, 2006, where petitioner was represented by attorney Robert Catlett. Mr. Blankenship testified at the omnibus hearing. The circuit court denied petitioner’s amended habeas petition on November 15, 2006. This Court subsequently refused petitioner’s appeal of the denial of habeas relief by an order entered on September 20, 2007.

Petitioner filed his instant petition for a writ of habeas corpus on January 4, 2011. He again raised his claim that trial counsel Mr. Blankenship had been ineffective for his failure to argue for mercy. Petitioner also made a new claim, that Mr. Catlett had been ineffective as habeas counsel when he failed to hire “an expert in the field of defense” to testify concerning Mr. Blankenship’s failure to argue for mercy. The circuit court denied petitioner’s instant habeas petition. The circuit court ruled as follows in pertinent part:

3. Petitioner’s first issue in the instant Petition was the same issue addressed in the omnibus hearing and by this Court’s November 15, 2006, order, and thus is now *res judicata*. . . .

* * *

4. Mr. Catlett is an experienced criminal law attorney who specializes in criminal defense. Even if Mr. Catlett had hired some type of expert in criminal defense, there is no reasonable possibility that the result of the omnibus hearing would have been different.

Petitioner notes on appeal that trial counsel testified in the previous habeas proceeding and argues that the record indicates Mr. Blankenship did nothing to investigate his case or hire an expert. In response, Warden Ballard argues that the circuit court properly denied habeas relief on both claims petitioner raised in his instant habeas petition, including petitioner’s claim that Mr. Catlett was ineffective as habeas counsel when he failed to hire “an expert in the field of defense” to testify concerning Mr. Blankenship’s failure to argue for mercy at trial.

The circuit court determined that Mr. Blankenship’s effectiveness as trial counsel had been previously and finally adjudicated. The appropriate standard of review is set forth 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.

In the prior habeas corpus proceeding, the circuit court ruled on Mr. Blankenship's effectiveness after Mr. Blankenship testified at an omnibus hearing where petitioner was represented by habeas counsel. It is long-established that an issue is fully and finally adjudicated "where there has been an omnibus habeas corpus hearing at which the applicant for habeas corpus was represented by counsel" Syl. Pt. 2, in part, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). Accordingly, the circuit court did not clearly err in finding that "Petitioner's first issue in the instant Petition was the same issue addressed in the omnibus hearing and by this Court's November 15, 2006, order, and thus is now *res judicata*."

As his second ground for relief in his instant habeas petition, petitioner argued that Mr. Catlett was ineffective as habeas counsel when he failed to hire "an expert in the field of defense" to testify concerning Mr. Blankenship's failure to argue for mercy. The appropriate test for measuring ineffective assistance of counsel is set forth in Syllabus Point Five, *State of West Virginia 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.

In the case sub judice, the circuit court found that "Mr. Catlett is an experienced criminal law attorney who specializes in criminal defense." In addition, the circuit court found that "[e]ven if Mr. Catlett had hired some type of expert in criminal defense, there is no reasonable possibility that the result of the omnibus hearing would have been different." Petitioner confessed to Mr. Washington's murder in a written statement that this Court later determined to have been properly admitted in *State of West Virginia v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986). Given these factors, this Court finds no error in the decision of the circuit court, and the January 7, 2011, order denying petitioner's seventh petition for a writ of habeas corpus is affirmed.

Affirmed.

ISSUED: June 8, 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