

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

**William Thompson,
Petitioner Below, Petitioner**

vs.) No. 11-0645 (Kanawha County 11-MISC-102)

**David Ballard, Warden, Mount 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 William Thompson appeals the March 2, 2011 order of the Circuit Court of Kanawha County dismissing without prejudice his petition for a writ of habeas corpus. The respondent warden, by Barbara H. Allen, his attorney, filed a summary response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 of Appellate Procedure.

In April of 1993, petitioner was living with his girlfriend Ruth P. and her two minor children, J.P. and A.P. On April 9, 1993, Ruth P. took a videotape labeled "The Wizard of Oz" off of a shelf in the living room and put it in the VCR for her children to watch. When the tape began playing, it showed petitioner engaged in sexual conduct with J.P. Ruth P. immediately turned off the VCR and put the tape away. On April 17, 1993, Ruth P. went to State Police Headquarters and told Trooper Grundy about the tape's contents. Trooper Grundy went to petitioner and Ruth P.'s residence, and Ruth P. gave Trooper Grundy the tape. Trooper Grundy returned to headquarters and watched the tape. He did not obtain a search warrant before obtaining and viewing the "Wizard of Oz" tape.

Later that same day, Corporal Sutton interviewed J.P. and learned that there was another videotape in petitioner's bedroom dresser drawer. Corporal Sutton obtained a signed consent to search the residence from Ruth P., and he seized a videotape located under some socks in petitioner's dresser drawer. Corporal Sutton viewed this second tape, which also contained explicit sexual acts between petitioner and J.P. Corporal Sutton did not obtain a search warrant before seizing this second tape.

Petitioner was indicted on 120 counts but went to trial on ninety-six counts: Thirty-five counts of first degree sexual assault; forty-five counts of sexual abuse by a parent, guardian, or custodian; Twelve counts of first degree sexual abuse; two counts of filming sexually explicit conduct of a minor, and two counts of possessing material depicting a minor engaged in sexually explicit conduct. The jury was shown the two videotapes. Also, the prosecutor prepared summary charts of the evidence on the two tapes, which purported to link particular segments of the two tapes to the specific acts and offenses alleged in the indictment. The summary charts were not authenticated by any witness and were not admitted as evidence at trial. Over a defense objection, the charts were submitted to the jury to assist when it viewed the tapes during deliberations. Ultimately, the jury had the summary charts during deliberations but decided not to view the tapes again.

At the February 1995 trial, the jury convicted petitioner of all ninety-six counts. He was sentenced to a minimum of 150 years in prison. His direct appeal was refused by this Court on October 31, 1996.

Thereafter, petitioner filed a petition for a writ of habeas corpus. An evidentiary hearing was held, where petitioner was represented by Gregory L. Ayers. The circuit court denied habeas relief on all grounds. First, the circuit court found no due process or fair trial violation in the jury's possession of the summary charts of the two video tapes. The circuit court found that the charts could have been admitted as State's Exhibits. The circuit court found that petitioner failed to show any prejudice from the jury's use of the charts, as the tapes contained graphic images of petitioner performing almost unimaginable acts of perversion upon a young child. Thus, it appeared far more likely that the use of the charts, rather than the tapes, would be to petitioner's advantage.

Second, the circuit court found no Fourth Amendment violation for the search and seizure of the second videotape without a warrant. The circuit court found it reasonable for the State Police to believe that Ruth P. could consent to the search of petitioner's dresser drawer. The circuit court found that the dresser was unlocked and located in the bedroom that Ruth P. shared with petitioner, that Ruth P. had regular access to the dresser for the purpose of putting away laundry, that petitioner knew Ruth P. could easily search the dresser, and that petitioner did not make any effort to secret the video tape as J.P. knew about the tape's location. On the final ground for relief, the circuit court ruled that no warrant was necessary for the "Wizard of Oz" video tape because Trooper Grundy's search did not exceed the scope of the private search conducted by Ruth P. and petitioner gave up any expectation of privacy because he left the tape in a common living area labeled "Wizard of Oz." Ruth P. viewed enough of the tape to know that it showed petitioner engaging in sex acts with her child J.P. The circuit court found that by the time Trooper Grundy viewed the tape, there was no doubt about its contents and the only issue was how many sex acts, and of what nature, were contained on the tape. When petitioner appealed the circuit court's denial of habeas relief, this Court refused his petition on May 10, 2007.

Petitioner filed his instant petition for a writ of habeas corpus on February 24, 2011, raising the following issues: (1) Ruth P. perjured herself at trial; (2) petitioner was never evaluated for

competency; and (3) counsel was ineffective. Petitioner also requested that he be appointed counsel for the instant habeas proceeding. The circuit court dismissed petitioner's instant habeas petition, noting, *inter alia*, that Rule 4(c) of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings, which addresses evaluation of a habeas petition for summary dismissal, provides as follows: "If the petition contains a mere recitation of grounds without adequate factual support, the court may enter an order dismissing the petition, without prejudice, with directions that the petition be refiled containing adequate factual support. The court shall cause the petitioner to be notified of any summary dismissal." The circuit court concluded that "[petitioner's] petition contains a mere recitation of grounds without adequate factual support, and, therefore, because the petition has failed to demonstrate to the Court's satisfaction that the petitioner is entitled to relief, no hearing is required." The circuit court ordered that petitioner's habeas petition was "DISMISSED without prejudice" and that "[t]he Clerk of this Court shall serve a copy of the order upon the petitioner."

On appeal, petitioner argues that the circuit court should be reversed and that he be afforded a second habeas corpus proceeding with counsel appointed. The respondent warden argues that the issues raised in petitioner's instant habeas petition have been fully and finally adjudicated in his previous habeas proceeding and/or lack substantial merit. The respondent warden argues that the circuit court should be affirmed.

There are instances where a prisoner may be entitled to a successive habeas corpus proceeding, but in order to move forward with any habeas proceeding, the prisoner must have adequate factual support for his allegations. In Syllabus Point One, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973), this Court held that "[a] court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief." See also Rule 4(c). The circuit court cited to and complied with both *Perdue* and Rule 4(c) in dismissing petitioner's habeas petition without prejudice. Therefore, after careful consideration, this Court concludes that the circuit court did not err.

For the foregoing reasons, we affirm.

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