

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

**Brenton Cory Rodeheaver,
Petitioner Below, Petitioner**

vs.) No. 11-0680 (Mineral County 11-C-7)

**Andrew Hale, Warden, Huttonsville
Correctional Center, Respondent Below,
Respondent**

FILED

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

MEMORANDUM DECISION

Petitioner Brenton Cory Rodeheaver appeals the March 30, 2011 order of the Circuit Court of Mineral County denying his petition for a writ of habeas corpus without a hearing. The respondent warden, by Laura Young, 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.

On July 7, 2007, at approximately 3:30 a.m., Keyser City police officers found a man, David Green, in a parking lot across the street from the Mineral County Courthouse. Mr. Green informed the police officers that he had been robbed at knife-point by a man in an army camouflage outfit. Mr. Green's wallet, including his social security card and driver's license, were stolen during the crime. About half an hour later, police officers were called to a residence half a block away with a report of an attempted robbery with a knife. Officers thereafter discovered a man in the camouflage clothing at the scene. Following a struggle, the man dropped the social security card belonging to Mr. Green. Police officers identified the man in the camouflage as petitioner.

In September 2007, petitioner was indicted on one count of aggravated robbery. Ernest Poland was eventually appointed as petitioner's counsel. Mr. Poland commenced plea negotiations. On February 11, 2009, petitioner pled guilty to aggravated robbery, as a part of a plea agreement, and was committed to the Anthony Center for the usual term of six months to two years. The circuit court deferred further sentencing until after petitioner completed the Anthony Center program. The circuit court ruled that if petitioner successfully completed the program, he would be placed on probation, during which he would participate in the Teen Challenge Program on Long Island, New York.

Petitioner successfully completed the Anthony Center program and was discharged from there on February 10, 2010, but he no longer desired to participate in the Teen Challenge Program. The circuit court imposed a deferred sentence of twelve years for aggravated robbery. The circuit court suspended the prison term and placed petitioner on five years probation. The circuit court ordered that it would excuse the full probation term after three years if petitioner successfully completed the terms of probation and paid restitution.

On March 23, 2010, petitioner quit his job at Lumber 'n' Things in violation of the terms of his probation. Petitioner committed another probation violation on April 6, 2010, when he traveled through Maryland en route to Pennsylvania. While in Maryland, petitioner was involved in an automobile accident and was cited for driving without a license, failure to control speed to avoid a collision, and failure to immediately stop at the scene of an accident with bodily injury. As a result of these incidents, a probation violation report was filed against petitioner with the following charges: (1) failure to remain law abiding; (2) failure to immediately report police contact; (3) failure to maintain employment; (4) falsifying his monthly report; and (5) leaving the State without permission. At an April 22, 2010 hearing, petitioner did not want to admit to the driving offenses in Maryland because they were still pending. He did, with advice of counsel, admit that he was outside of the State without permission and that he had quit his job. Petitioner also expressed an ambition to attend Potomac State College, and based in large part upon his expressed ambition, the circuit court reinstated his probation.

On May 17, 2010, William Bernier, a probationer and fellow inmate of petitioner's at the Anthony Center, admitted to the probation officer that he had smoked marijuana with petitioner. The probation officer attempted to contact petitioner, but he failed to report. On June 8, 2010, a warrant was issued for petitioner's arrest. The following day, June 9, 2010, petitioner's grandmother reported that he was in jail in Shenandoah County, Virginia on a failure to appear warrant issued by a Maryland court on his driving offenses. Subsequently, in July of 2010, petitioner admitted to being outside of the State without permission and was sentenced to the twelve-year prison term for aggravated robbery. He was given 318 days of credit for time previously served. Mr. Poland filed a motion for reconsideration on petitioner's behalf, which the circuit court denied. However, on August 16, 2010, the circuit court granted a *pro se* motion to give petitioner more credit for time served. Another motion for reconsideration was denied on November 18, 2010.

Petitioner filed a petition for a writ of habeas corpus on January 19, 2011, raising four grounds for relief: (1) ineffective assistance of counsel; (2) mental incompetency at the time of the guilty plea; (3) alleged failure to abide by the plea agreement; and (4) allegedly invalid probation violations. The circuit court denied petitioner's habeas petition on March 20, 2011, in an eight page order containing seventeen findings of fact and nine conclusions of law. Petitioner perfected his appeal to this Court on July 5, 2011.

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.

I. ALLEGEDLY INVALID PROBATION VIOLATIONS

Petitioner argues that the circuit court erred in accepting his admission at the April 22, 2010 probation revocation hearing that he failed to remain law abiding when the Maryland driving offenses were still pending at the time and were subsequently dismissed. The respondent warden argues that the circuit court did not abuse its discretion in finding no merit to this issue. First, petitioner never admitted to the Maryland driving offenses as probation violations in West Virginia. He admitted only to being outside of the State without permission and quitting his job. Even if he had admitted to the driving offenses as probation violations, it was not necessary to wait until those charges were resolved before proceeding on the probation revocation. *See* Syl. Pt. 2, *State v. Ketchum*, 169 W.Va. 9, 289 S.E.2d 657 (1981) (holding that a probation violation hearing may be held and probation revoked even if the underlying offense does not result in a conviction). Furthermore, petitioner's probation was reinstated after his April 2010 admissions that he was outside of the State without permission and that he had quit his job.

Petitioner further argues that when he was charged with violating his probation the second time, the circuit court should not have revoked his probation based upon Mr. Bernier's assertion that petitioner had been smoking marijuana with him. The respondent warden argues that petitioner's argument has no merit. The respondent warden is correct. The charge that petitioner had been smoking marijuana did not serve as the basis of the July 2010 revocation of his probation. Rather, the circuit court found that petitioner's probation was revoked because "[he] admitted leaving the state without permission." The circuit court's finding is not clearly erroneous because petitioner had been detained in the Shenandoah County, Virginia jail. Therefore, this Court concludes that the circuit court did not abuse its discretion in denying habeas relief on this issue.

II. ALLEGED FAILURE TO ABIDE BY PLEA AGREEMENT

Petitioner argues that the circuit court violated his plea agreement by not placing him in the Teen Challenge Program when it placed him on probation. The respondent warden argues that the circuit court was not clearly erroneous in finding "[petitioner] declined the choice to go to Teen Challenge upon his release from the Anthony Center." Therefore, after careful consideration, this

Court concludes that the circuit court did not abuse its discretion in denying habeas relief on this issue.

III. MENTAL COMPETENCY AT THE TIME OF PLEA

Petitioner argues that the circuit court should have ordered a psychological evaluation before accepting his guilty plea. The respondent warden argues that this issue lacks merit because, *inter alia*, the circuit court found that at the time of his guilty plea, petitioner stated that “he was satisfied with his lawyer, that he was clear-headed, and that his judgment was not clouded by drugs.” In addition, the circuit court was sufficiently familiar with petitioner given that “[t]his Court has dealt with [petitioner] since he was a juvenile in Grant County.” The circuit court found that “[petitioner] is very intelligent and knows exactly what is going on.” Therefore, this Court concludes that the circuit court did not abuse its discretion in denying habeas relief on this issue.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

The circuit court did not conduct a hearing on petitioner’s habeas petition including his various allegations of ineffective assistance of counsel. “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.” Syl. Pt. 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973). In addition to the findings set forth under Issue III, the circuit court found that the plea agreement that petitioner’s counsel negotiated on petitioner’s behalf presented him with “an extremely generous opportunity.” The circuit court found that Mr. Poland “was apparently very persuasive” in obtaining that plea agreement for petitioner. Although petitioner alleges that Mr. Poland did not conduct a reasonable investigation of his case, the circuit court found that counsel’s investigation did not need to be extensive because “[petitioner] was arrested one block from the scene with the knife and [Mr. Green]’s property still in his possession and while attempting yet another robbery.” The circuit court concluded that petitioner’s counsel had not been ineffective “but, on the contrary, did a remarkable job for his client.” Therefore, this Court concludes that the circuit court did not abuse its discretion in denying habeas relief on this issue.

V. ADDITIONAL ISSUES FIRST RAISED ON APPEAL

Regarding the other assignments of error raised by petitioner on appeal, none of those issues were alleged as grounds for relief in his petition for a writ of habeas corpus. “‘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). Because the circuit court did not have an opportunity to decide the issues first raised on appeal, this Court will not pass on them in the first instance.

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