

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

**Clyde Crawford,
Petitioner Below, Petitioner**

vs) No. 11-0783 (Cabell County 00-C-250)

**David Ballard, Warden,
Respondent Below, Respondent**

FILED

**November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Clyde Crawford appeals the circuit court's order denying his petition for writ of habeas corpus following an omnibus hearing. The respondent warden has filed a 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 August 15, 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.

I. Facts

Petitioner was indicted on four counts of first degree robbery in violation of West Virginia Code § 61-2-12. He pled guilty to two counts of first degree robbery with a finding of use of a firearm. Petitioner states that as part of the plea agreement, the State was to move for the dismissal of two of the counts. Further, the State would not pursue a recidivist action. At the plea hearing, there was a disagreement as to some of the terms of the plea agreement.

Petitioner's counsel indicated that he believed that the State had agreed to recommend to the trial court that petitioner be sentenced to a range between twenty to thirty years in prison on each of the two counts to which petitioner pled guilty, those sentences to run

concurrently with each other and with petitioner's federal sentence.¹ The State indicated that it understood the terms of the plea agreement to be that the State would recommend the range of twenty to thirty years in prison on each of the counts to which petitioner pled guilty and would not object to concurrent sentencing. At that point, a recess was taken in the plea hearing and trial counsel and petitioner met to discuss the terms of the plea agreement and to ensure that petitioner understood the terms of the plea agreement as asserted by the State.

After the recess, petitioner and his counsel informed the trial court that petitioner did understand and was ready to proceed with the entry of his guilty pleas.

In the circuit court's order denying the petition for writ of habeas corpus, the circuit court recognized that "the State stated on the record that it had no objection to concurrent sentences for the State charges, and would leave the issue of running the State sentence concurrent with the Federal sentence up to the Court." The circuit court concluded that "any perceived ambiguity was resolved before the petitioner entered his plea . . . [t]herefore, petitioner's assertion that his plea was involuntary because it was based upon representations of the State which were not fulfilled is groundless."

The circuit court also recognized that during the plea hearing, petitioner was "not specifically informed that he would have no right to withdraw his plea if the trial court did not accept the requested sentence." The trial court did inform petitioner that a presentence investigation report would be done and that the trial court would be "guided by that presentence investigation and the law of this state in imposing whatever sentence I impose." In the order denying the habeas petition, the circuit court noted that the trial court also informed petitioner "that it would not be bound by the sentencing agreement presented to the court on that date." At the omnibus habeas hearing, petitioner testified that he understood what the circuit court "was saying when he was telling me that. I understood that he wasn't going to be bound by any agreement." Petitioner thereafter equivocated and stated, "Well, I didn't understand it completely."

At sentencing, the State recommended a prison sentence between twenty to thirty years and indicated that it had no objection to concurrent sentencing. The State took no position as to whether the sentences for the first degree robbery convictions should run concurrently with petitioner's federal sentence. The trial court sentenced petitioner to twenty-eight years on each count to run consecutively with each other and with his federal sentence. No direct criminal appeal was filed and a motion for reconsideration of sentence was denied.

¹ The petitioner had been convicted and sentenced to serve an unrelated federal charge.

“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.” Syl. Pt.1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). This Court has held that “[f]indings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E. 2d 69 (1975).” Syl. Pt. 1, *State ex rel. Waldron v. Scott*, 222 W.Va. 122, 663 S.E.2d 576 (2008) (per curiam).

II. Voluntariness of Guilty Plea

Petitioner contends that the circuit court should have found that his guilty plea was involuntary because he was induced into pleading guilty by promises made by the State which were not fulfilled. Specifically, petitioner argues that the State was to recommend concurrent sentencing but only stated that it had no objection to such sentencing. Petitioner also argues that the requirements of Rule 11(e) of the West Virginia Rules of Criminal Procedure were not observed, which further rendered his guilty plea invalid as involuntary.

Respondent warden argues that the circuit court properly found that “any perceived ambiguity was resolved before the petitioner entered his plea.” A conference was held in recess during the plea hearing during which petitioner discussed the plea terms with his counsel. Respondent argues that the circuit court conducted extensive questioning of petitioner regarding the plea and petitioner indicated that he understood its terms. Further, trial counsel testified during the omnibus habeas hearing that during this conference, he spent a significant amount of time educating petitioner as to the difference between the State standing silent and the State making a recommendation. Trial counsel further testified and opined that petitioner understood the difference following this discussion. The Court concludes that under these particular facts, there was no error by the circuit court in denying habeas relief on this ground.

Turning to the issues involving Rule 11(e), the Court notes its decision in *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W.Va. 11, 528 S.E.2d 207 (1999), which recognized that a habeas petitioner may successfully challenge a guilty-plea conviction based upon an alleged Rule 11 violation only by establishing that the violation constituted a constitutional or jurisdictional error, or that the error resulted in either a complete miscarriage of justice or a proceeding inconsistent with the rudimentary demands of fair procedure. In addition, a petitioner must demonstrate prejudice in that he was unaware of the consequences of his plea and, if properly advised, would not have pled guilty. In *State*

v. Valentine, 208 W.Va. 513, 541 S.E. 2d 603 (2000), this Court recognized that the omission of the statement required by Rule 11(e)(2) must be deemed harmless error unless there is some realistic likelihood that the defendant labored under the misapprehension that his plea could be withdrawn. Here, the circuit court found that the trial court's colloquy with petitioner clearly explained that it would not be bound by any agreement as to sentencing and that if it appeared appropriate in its discretion, it could sentence him to fifty years. The Court concludes that the standard set by *Vernatter* was not met in this case.

III. Lack of Direct Criminal Appeal

Petitioner argues that the circuit court should have granted habeas corpus relief based upon his trial counsel's failure to file an appeal of his sentence. Petitioner asserts that after sentencing, he requested by letter that his trial counsel file a direct criminal appeal but that such appeal was never filed. Trial counsel testified during the omnibus habeas hearing that he never received such a letter from petitioner. Further, trial counsel testified that although petitioner was apprised of his right to appeal, he never expressed such desire to appeal to trial counsel. Further, both petitioner and trial counsel testified that petitioner retained private counsel to represent his interests following his sentencing. Under these facts and circumstances, the Court finds no error in the denial of habeas relief on this ground.

IV. Ineffective Assistance of Counsel

Petitioner argues that the circuit court erred in failing to find ineffective assistance of trial counsel. "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 (1995)." Syl. Pt. 1, *State v. Frye*, 221 W.Va. 154, 650 S.E.2d 574 (2006). Petitioner contends that his trial counsel was ineffective because he did not fully apprise petitioner of the full consequences of his guilty plea, including mistaken advice of counsel as to parole or probation eligibility, and counsel failed to object when the State pursued a plea agreement that petitioner argues was contrary to the terms understood by trial counsel and petitioner. Finally, petitioner argues that his trial counsel was ineffective because he failed to file a direct criminal appeal. Respondent warden argues that trial counsel met with petitioner in recess during the plea hearing to ensure that petitioner understood the terms of the plea agreement. Trial counsel testified at the omnibus hearing that he did not doubt that petitioner understood the terms of the plea agreement. As for his failure to object, the warden contends that the trial counsel felt no need to object nor did petitioner urge him to do so. Finally, as to the allegation that he received mistaken advice

regarding parole eligibility, respondent warden argues that the issue was discussed openly in court with the prosecutor explaining on the record what parole eligibility would be given the firearm component. Under these particular facts and circumstances, the Court concludes that the circuit court did not err in finding that petitioner did not receive ineffective assistance of counsel.

V. Length of Sentence

Next, petitioner argues that the circuit court erred in failing to find that petitioner received an excessive sentence. Petitioner argues that two twenty-eight year sentences to be served consecutively with a sixty-three month federal sentence is excessive and violative of the proportionality principle found in Article III, Section 5 of the West Virginia Constitution and the protection against cruel and unusual punishment. This Court has recognized two tests for determining whether a sentence violates the proportionality principle. The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a proportionality challenge is guided by the objective test. Under the objective test, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction. *See State v. Adams*, 211 W.Va. 231, 565 S.E.2d 353 (2002) (per curiam).

Petitioner argues that his offenses consist of robbing two gas stations at gunpoint and firing one warning shot when he was twenty-one-years-old. No one was harmed. A review of the record reveals a statement by one of the victims that petitioner fired a shot “between mine and a fellow employees [sic] head . . . he told us to give him the money and lie on the floor . . . [a]s I was lying on the floor I was wondering if he was going to shoot me since he had already fired a shot for no apparent reason.” Respondent warden argues that petitioner was sentenced within statutory parameters for first degree robbery with a firearm, and that the sentence is not shocking to the conscience given the crimes committed and petitioner’s extensive criminal history. The Court notes that although petitioner correctly argues that there was no physical injury to the victims in this case, given the inherent potential for harm in an aggravated robbery, the legislature has granted trial courts broad discretion in sentencing defendants convicted of the crime of first degree robbery. A review of the circuit court’s order reveals that it properly conducted a proportionality analysis and that its review of other sentences indicates that petitioner’s sentence is not disproportionate under the objective test set forth above. Based upon the facts and circumstances of the instant case, the Court concludes that the circuit court did not err in denying habeas relief on this ground.

VI. Severity of Sentence

Petitioner argues that the circuit court erred in failing to find that petitioner received a more severe sentence than expected. Petitioner bases this argument upon the fact that he received consecutive rather than concurrent sentencing. As set forth above, the circuit court found that the dialogue held in recess at the plea hearing settled any doubts about the terms of the plea agreement. Further, the circuit court held that petitioner was made aware by the trial court that he could receive a sentence much higher than the twenty-eight year sentences he actually received. The circuit court also indicated that petitioner was made aware that the final decision regarding the length of his sentence would rest with the trial court. The Court finds no error in the circuit court's denial of habeas relief on this ground.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 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