

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

**Donald W.,
Petitioner Below, Petitioner**

FILED
November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) **No. 11-0817** (Hancock County 01-P-34)

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

MEMORANDUM DECISION

Petitioner Donald W.'s¹ appeal, filed by counsel Stephen Herndon, arises from the Circuit Court of Hancock County, wherein petitioner's petition for habeas corpus relief was denied by order entered on May 4, 2011. Warden Ballard² of Mount Olive Correctional Complex, by counsel Laura Young, filed a response in support of the circuit court's order. Petitioner subsequently filed a reply brief.

This 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.

Petitioner's petition in circuit court for habeas corpus relief was based on issues that arose from different underlying criminal matters. Ultimately, petitioner was either convicted by jury or pled guilty to various sexual offenses. In 1998, the circuit court sentenced petitioner to consecutive sentences of five to ten years, five to fifteen years, and one to five years in prison, alongside several fines. In 2001, petitioner filed his petition for writ of habeas corpus in circuit court. An evidentiary hearing was held in 2003, after which the circuit court advised the parties to file briefs of proposed findings. In March of 2010, petitioner learned that a ruling for his petition for habeas corpus relief was still pending. The parties filed their proposed findings in

¹ Because the victims in petitioner's underlying matters were relatives and minors, we follow our traditional practice in cases involving sensitive facts and use only petitioner's last initial. *See State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

² Pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure, we have replaced the respondent party's name with Warden David Ballard. The initial respondent on appeal, Howard Painter, is no longer the warden of Mount Olive Correctional Complex.

September of 2010. The circuit court entered its order denying petitioner habeas corpus relief in May of 2011. In between the omnibus evidentiary hearing and the time this order was entered, petitioner's original trial counsel passed away, as did the court reporter who recorded the omnibus evidentiary hearing. The court reporter's tapes, notes, or other work from this hearing were never recovered. Petitioner appeals the circuit court's order denying him habeas corpus relief.

"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." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009).

On appeal, petitioner presents the same issues as he raised in circuit court. In addition, petitioner also raises that because the transcript for his omnibus evidentiary hearing has been lost, his claims are unreviewable by this Court and therefore, he requests that the circuit court be directed to determine whether the record can be replicated. If it cannot be replicated, petitioner requests a new trial. In response, the State contends that the circuit court correctly denied petitioner habeas corpus relief. The State argues that because all of the records from petitioner's underlying matters are available, his habeas petition is capable of review and that accordingly, the habeas circuit court did not abuse its discretion or err in denying habeas corpus relief.

We find no error by the circuit court in denying petitioner habeas corpus relief. First, we agree that even though the record of the omnibus habeas hearing is unavailable, the habeas court and this Court can nonetheless decide the issues raised herein. The issues raised are sufficiently presented in the record that does exist, including the trial record. From the appendix record submitted on appeal, it appears that a request for a transcript of the omnibus habeas hearing was not filed until 2011. Second, having reviewed the circuit court's "Order" entered on May 4, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal.³ The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.⁴

For the foregoing reasons, we affirm the circuit court's order denying habeas corpus relief.

Affirmed.

³ Consistent with our explanation in the first footnote of this memorandum decision, the parties' names in the circuit court order have been redacted to leave only their initials.

⁴ We note that the copy of the circuit court order attached is time-stamped January 5, 2011. It is undisputed that the circuit court later re-entered this order for purposes of appeal and it was time-stamped May 4, 2011.

ISSUED: November 16, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum (Chief Justice Ketchum dissents and would remand for a new evidentiary hearing on the original habeas corpus petition.)