STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Petitioner Below, Respondent

vs) No. 11-0861 (Monongalia County 10-F-14)

Austin Van Trease,
Defendant Below, Petitioner

FILED
October 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Austin Van Trease, convicted of one count of malicious assault by jury, appeals the circuit court order sentencing him to two to ten years. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition. There was no response filed.

This Court has considered the petitioner's brief and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the petition 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 petition, 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.

Petitioner was involved in a fight in which he kicked the victim in the head after the victim was knocked down by a punch thrown by petitioner's co-defendant. The victim has suffered permanent serious neurological injury. Expert testimony at trial showed that it could not be determined to a reasonable degree of medical certainty if the injury was caused by the victim falling to the ground after being punched by the co-defendant, or if the injury was caused by petitioner's kick. On appeal, the petitioner argues that his counsel was ineffective in not severing the two defendants' trials, as it could not be proven which defendant severely injured the victim. Further, he argues that a jury instruction stating that intent may be inferred from the defendant's actions was improper.

Regarding the petitioner's ineffective assistance of counsel claim, this issue is not appropriate for direct appeal. As recognized in *State v. Frye,* 221 W.Va. 154, 650 S.E.2d 574 (2006), when an issue of ineffective assistance of counsel has been presented for the first

time on appeal rather than the preferred method of seeking relief through a habeas corpus proceeding, and the Court lacks rulings from the circuit court to provide a basis for such review, the applicable standard of review is found in Syllabus Point Five of *State 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.

Syl. Pt. 5, *State v. Miller,*194 W.Va. 3, 459 S.E.2d 114 (1995).

In the case-at-bar, there is no evidence regarding why counsel did not move for separate trials for the two co-defendants. This Court has recognized that "'it is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal.'" *State v. Miller,* 194 W.Va. 3, 14, 459 S.E.2d 114, 125 (quoting *State v. Triplett,* 187 W.Va. 760, 771, 421 S.E.2d 511, 522 (1992)). As the Court explained in *State v. Miller*, this is due to the undeveloped state of the record:

> The very nature of an ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal. To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies.

194 W.Va. at 15, 459 S.E.2d at 126. This Court has held that:

> An incarcerated individual who raises an issue on direct appeal that was not the subject of a previous petition seeking post-conviction relief under West Virginia Code § 53-4A-1 (1967) (Repl.Vol.2000) is not prohibited from seeking habeas corpus relief following the issuance of an opinion by the West Virginia Supreme Court of Appeals where the decision on the appeal does not contain any ruling on the merits of the issue, as no final adjudication within the meaning of West Virginia Code § 53-4A-1 has resulted.

Syl. Pt. 4*, State v. Frye ,* 221 W.Va. 154, 650 S.E.2d 574 (2006). In the case-at-bar, the Court concludes that the record is not properly developed to permit review of this issue on its merits. Therefore, because this Court declines to address the merits of petitioner's ineffective

assistance of counsel claim, relief in the form of habeas corpus is not barred under the provisions of West Virginia Code § 53-4A-1 as the result of petitioner's having instituted a direct appeal raising the issue.

Petitioner also argues that the circuit court erred in allowing a jury instruction on inference. The specific instruction, which was entered over the objections of defense counsel, is as follows:

> The intent to commit a crime is an element of every offense. You may infer that the intent existed from the facts and circumstances of the case. Intent is the purpose formed in a person's mind. The state of mind of a person may be shown by his acts and conduct. The jury may infer, but is not required to infer, a defendant's intent from his actions.

In support of this instruction, the State cited *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982). "The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syl. Pt. 6, *Tennant v. Marion Health Care Foundation, Inc*. 194 W.Va. 97, 459 S.E.2d 374, (1995). In the present case, the instruction was fully argued before the circuit court. This Court finds no error in the circuit court's ruling allowing the use of this instruction.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 25, 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