

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

**Brandon A. Butler, Petitioner Below,
Petitioner**

vs) **No. 11-0866** (Kanawha County 09-MISC-463)

**Adrian F. Hoke, Warden, Huttonsville
Correctional Center, Respondent Below,
Respondent**

FILED

May 29, 2012

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

MEMORANDUM DECISION

This appeal with accompanying appendix record, filed by counsel Charles R. Hamilton, arises from the Circuit Court of Kanawha County, wherein petitioner's petition for writ of habeas corpus was denied by order entered on May 23, 2011. Respondent Hoke, by counsel Benjamin Yancey III, filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the appendix 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 appendix 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 2007, petitioner was convicted by jury of burglary and malicious wounding. Subsequently, the State filed a "Recidivist Information For Second Offense Felony" against Petitioner Butler based on Petitioner Butler's 2006 conviction in New Jersey for aggravated assault in the fourth degree and his convictions for burglary and malicious wounding. Petitioner Butler pled guilty to this information. The circuit court sentenced Petitioner Butler to one to fifteen years for his burglary conviction and two to ten years for his malicious wounding conviction. Due to Petitioner Butler's plea to the recidivism information and pursuant to West Virginia Code § 61-11-18, the circuit court enhanced Petitioner Butler's sentence for malicious wounding from a sentence of two to ten years to a sentence of four to ten years, with 286 days credit for time served in jail. Petitioner Butler appealed these convictions in May of 2010, which this Court refused in October of 2010. Petitioner Butler petitioned for a writ of habeas corpus in December of 2010, arguing that the circuit court erred in applying the recidivist statute and claiming ineffective assistance of his trial counsel. The circuit court subsequently held an evidentiary omnibus hearing on this petition in April of 2011, and the

circuit court denied Petitioner Butler habeas relief in its written order of May 23, 2011. It is from this order that Petitioner Butler appeals, arguing two assignments of error.

Petitioner Butler raises two different issues under his first assignment of error. Petitioner Butler first raises that the circuit court erred in using his New Jersey conviction toward his recidivism plea. He argues that the circuit court erred in finding that his New Jersey conviction of aggravated assault would be akin to unlawful assault in West Virginia. Rather, he asserts that the same crime would have been classified as a misdemeanor battery in West Virginia. Second, Petitioner Butler argues that, pursuant to *State v. Stover*, 179 W.Va. 338, 368 S.E.2d 308 (1988), even if the New Jersey conviction could be a basis for his recidivist sentence, the circuit court erred in enhancing his sentence for his malicious wounding conviction, rather than for his burglary conviction.¹ Additionally, petitioner argues that the circuit court erred in not finding ineffective assistance by his trial counsel. Under this assignment of error, Petitioner Butler raises four issues: (1) his trial counsel failed to determine if the jury was drawn from a fair cross-section of the community, (2) his trial counsel failed to retain a physician for toxicological evidence, (3) his trial counsel failed to properly investigate the offense, and (4) his trial counsel failed to object to the State's misleading opening statement.

In response, Respondent Hoke contends that the circuit court did not err in denying habeas corpus relief to Petitioner Butler. Respondent Hoke argues that petitioner's aggravated assault conviction in New Jersey was based on actions that would be far more egregious than what is contemplated in West Virginia's battery statute, and that the actions are more akin to the elements of unlawful assault, a felony in West Virginia. Respondent Hoke further raises that *State v. Stover* does not instruct circuit courts as to which conviction to enhance when faced with more than one conviction. He further argues that circuit courts are given wide discretion in sentencing. Moreover, "[t]he primary purpose of our recidivist statutes . . . is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses." Syllabus point 3, in part, *State v. Jones*, 187 W.Va. 600, 420 S.E.2d 736 (1992)." Syl. Pt. 3, in part, *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800 (2002). Accordingly, Respondent Hoke argues that the circuit court's decision to double the malicious wounding sentence under the recidivist statute acts as more of a deterrent than doubling the burglary sentence. With regard to petitioner's claims under his ineffective assistance of counsel argument, Respondent Hoke argues that, pursuant to Syllabus Point 1 of *State ex rel. Kitchen v. Painter*, 226 W.Va. 278, 700 S.E.2d 489 (2010), petitioner has failed to show that his trial counsel's performance

¹ In 2010, Petitioner Butler appealed these sentences, arguing that the trial court erred in using his New Jersey conviction toward his recidivism sentence and that it erred in enhancing his sentence for his malicious wounding conviction, rather than his sentence for his burglary conviction. This Court refused his petition for appeal. If claims were merely raised in a petition that was refused, those issues are not precluded from consideration of habeas corpus relief. *Smith v. Hedrick*, 181 W.Va. 394, 382 S.E.2d 588 (1989). Because the Court issued a refusal of Petitioner Butler's 2010 appeal, Petitioner Butler was not precluded from raising these issues in his petition for writ of habeas corpus.

was deficient under the objective standard of reasonableness or that, but for these errors, there is a reasonable probability that the result of his trial would have been different.

This Court reviews appeals of circuit court orders denying habeas corpus relief under the following standard:

“In reviewing challenges to 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 *de novo* review.” Syllabus Point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 2, *State ex rel. Farmer v. McBride*, 224 W.Va. 469, 686 S.E.2d 609 (2009).

The Court has fully reviewed the issues raised by petitioner and has reviewed the appendix record. The Court concludes that the circuit court’s decision to deny relief based on petitioner’s recidivism arguments was proper. “Whether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute, *W.Va. Code* [§] 61-11-18-19 [1943], depends upon the classification of that crime in this State.” Syl. Pt. 3, *Justice v. Hedrick*, 177 W.Va. 53, 350 S.E.2d 565 (1986). The Court has held that in occasions where jurisdictions do not classify crimes in the same manner, “it would seem proper that the laws of this State should be considered in determining the grade of the crime for which there have been former convictions.” *Justice*, 177 W.Va. at 56, 350 S.E.2d. at 568 (quoting *State v. Lawson*, 125 W.Va. 1, 5, 22 S.E.2d 643, 645 (1942)). Here, the circuit court found that the aggravated assault charge in New Jersey is akin to unlawful assault in West Virginia. The circuit court also found that petitioner’s actions of his prior conviction in New Jersey would constitute unlawful assault in West Virginia. The Court finds no reversible error here.

Further, we also find that the circuit court did not err in enhancing the sentence for petitioner’s malicious wounding conviction, rather than for his burglary conviction. “‘In the absence of some express language in our recidivist statute, *W.Va. Code* [§] 61-11-18, authorizing criminal convictions returned against the defendant at the same time to be separately enhanced by a prior felony, it may not be done and only one enhancement is permissible.’ Syllabus, *Turner v. Holland*, 175 W.Va. 202, 332 S.E.2d 164 (1985).” Syllabus, *State v. Stover*, *supra*. Pursuant to *State v. Stover*, the circuit court only enhanced one of petitioner’s sentences, not both, and used its discretion as to which sentence to enhance.

The Court also concludes that the circuit court’s decision to deny relief based on petitioner’s arguments of ineffective assistance of counsel was proper under the facts and circumstances of this case, as discussed by the circuit court in its final order. Accordingly, we adopt and incorporate by reference the well-reasoned “Findings of Fact, Conclusions of Law, and Final Order” denying

Petitioner Butler's petition for habeas corpus relief, entered on May 23, 2011, and attached hereto.

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

ISSUED: May 29, 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

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2011 MAY 23 PM 4:47

CATHY S. CATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

BRANDON A. BUTLER,

Petitioner,

v.

Case No. 09-MISC-463
Judge Paul Zakaib, Jr.

**ADRIAN F. HOKE, WARDEN,
HUTTONVILLE CORRECTIONAL CENTER,**

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

On the 15th day of April, 2011, came the Petitioner, Brandon A. Butler, by counsel, and came the Respondent, Adrian F. Hoke, by Jennifer Meadows, Assistant Prosecuting Attorney in and for Kanawha County, for purposes of an evidentiary hearing on the above-referenced habeas corpus action. Pursuant to the Court's request, the Respondent submits the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On March 1, 2007, the Petitioner was convicted before this Court by a Kanawha County petit jury of the felony offenses of burglary and malicious wounding. The case number was 06-F-451.
2. Petitioner was represented in trial by John Sullivan of the Kanawha County Public Defender Office.
3. Petitioner was found not guilty of the most serious charge in the indictment—attempted first-degree murder.

4. John Sullivan testified at the evidentiary hearing held on April 15, 2011. He testified that in preparing for trial, he traveled to inspect the scene but did not send out an investigator to obtain witness statements because there were numerous statements taken during the investigation.
5. Mr. Sullivan further testified that he did not object during the assistant prosecutor's opening statement during which the prosecutor did not mention that the co-defendants had entered plea agreements with the State of West Virginia. Mr. Sullivan testified that he did not believe he had a valid objection to the State's opening as it was merely a trial strategy decision on part of the prosecutor as to how to present his case to the jury. Furthermore, Mr. Sullivan said he had never objected to something the prosecutor *did not* say during opening statements and has never seen a defense attorney do so.
6. Petitioner was previously convicted in Mercer County New Jersey of aggravated assault with a weapon in the fourth degree. According to the paperwork received from New Jersey, Petitioner, along with other individuals, chased the victim and proceeded to hit him in the head with a bottle, as well as kicked and punched him in the face and body. As a result, the victim sustained numerous cuts, abrasions, a concussion, and importantly—two broken bones under his left eye. He was sentenced on or around December 20, 2005 to three years of probation and was required to provide a DNA sample.
7. Based upon this previous conviction, the State of West Virginia filed a Recidivist Information contained in case number 07-F-143(I). Mr. Sullivan filed a Motion to Dismiss the Recidivist Information on behalf of Petitioner arguing that the conviction

prg
could not be ~~not~~ properly used under West Virginia's Recidivist Act. The motion was denied by this Court.

8. Petitioner entered a plea of guilty to the Felony Recidivist Information on May 28, 2007. Pursuant to the plea of guilty, the Petitioner reserved his right to appeal the appropriateness of using his New Jersey conviction as a predicate felony under West Virginia Recidivist Act.
9. Based upon the Petitioner's finding of guilty on burglary and malicious wounding, as well as his guilty plea to the recidivist information and applicable law, this Court imposed an indeterminate sentence of four to ten years on the malicious wounding count and an indeterminate sentence of one to fifteen years on the burglary count. The sentences were ordered to run concurrent with each other.
10. Petitioner filed an appeal in the West Virginia Supreme Court of Appeals on May 21, 2010. This appeal was denied on October 14, 2010.
11. Petitioner filed this Writ of Habeas Corpus seeking relief on the following grounds: (1) Petitioner's New Jersey conviction was improperly used under West Virginia's Recidivist Act; (2) the Court improperly enhanced the malicious wounding count instead of the burglary charge; (3) ineffective assistance of counsel; and (4) an improper opening statement by the State of West Virginia.

CONCLUSIONS OF LAW

12. The primary purpose of West Virginia's Recidivist Act is to deter persons who have previously been convicted and sentenced on penitentiary offenses from committing subsequent felony offenses. *State ex rel. Chadwell v. Duncil*, 196 W.Va. 600 (1996).

13. Pursuant to West Virginia Code section 61-2-28, an out-of-state conviction may be used as a predicate offense for penalty enhancement purposes under two circumstances: (1) the foreign statute has the same elements required for a conviction; or (2) conduct resulting in the conviction in the foreign state would be sufficient to support a felony conviction under West Virginia law.
14. Determining whether an out-of-state conviction satisfies the requirements of West Virginia's Recidivist Act is a question of law. *State v. Williams*, 200 W.Va. 466 (1997).
15. Petitioner was convicted in the State of New Jersey for aggravated assault and was sentenced as aggravated assault in the fourth degree.
16. Under New Jersey Code 2C:12-1b(2), a person is guilty of aggravated assault if he attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon. The potential sentence for this offense is up to 18 months incarceration.
17. West Virginia has varying degrees of assault against a person. They are: (1) simple battery and assault; (2) unlawful assault; and (3) malicious assault.
18. Unlawful assault in West Virginia is defined as when a person unlawfully, but not maliciously, shoots, stabs, cuts, or otherwise wounds another with the intent to kill, maim, or disfigure. It is punishable by an indeterminate term of one to five years in prison or, in the discretion of the court, one year in jail.
19. In West Virginia only felons are required to provide DNA samples. *See West Virginia Code* section 15-2B-6(a).
20. Felonies in West Virginia are considered to be those crimes subject to imprisonment in excess of one year.
21. The aggravated assault for which Petitioner was convicted is akin to unlawful assault in

22. West Virginia. Furthermore, the Petitioner's actions which constitute the aggravated assault—the beating, striking, and use of a weapon—would constitute an unlawful assault in West Virginia. Therefore, the conviction was properly used to enhance the Petitioner's sentence under West Virginia's Recidivist Act.
23. *State v. Stover*, 179 W.Va. 338 (1988) stands for the proposition that the Court may only enhance one conviction under the Recidivist Act. However, it does not instruct the Court as to which conviction it may enhance.
24. Trial courts are given great discretion in using convictions to enhance sentencing under the state's Recidivist Act. *State v. Harris*, 702 S.E.2d 603 (W.Va. 2010).
25. The recidivist statute, penal and in derogation of the common law, is to be strictly construed. *State ex rel. Ringer v. Boles*, 151 W.Va. 864 (1967).
26. Petitioner has put forth no law that prohibited this Court from enhancing the malicious wounding count as opposed to the burglary count. Therefore, the Court finds the Petitioner's argument on that issue without merit.
27. Ineffective assistance of counsel claims present “a mixed question of law and fact; we [the West Virginia Supreme Court] review the circuit court's findings of historical facts for clear error and its legal conclusions de novo.” Syl. Pt. 1, *State ex rel. Vernatter v. Warden*, 207 W.Va. 11 (1999) (citation omitted).
28. In West Virginia, ineffective assistance of counsel claims are governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). The two-pronged test consists of whether: (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 results of the proceedings would have been different. Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3 (1995).

29. In regard to the first requirement, Petitioner must first "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."

State ex rel. Myers v. Painter, 213 W.Va. 32 (2002) (citing *Strickland*, 466 U.S. at 690).

30. The West Virginia Supreme Court has provided the following standards for reviewing counsel's performance:

Court must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Miller at Syl. Pt. 6.

31. Importantly, "[t]he petitioner's burden in this regard is heavy, as there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." *Vernatter*, 207 W.Va. at 17 (internal citation omitted).
32. Moreover, in evaluating counsel's performance, the Supreme Court of Appeals of West Virginia held that courts must avoid the use of hindsight when evaluating counsel's conduct. "Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices." *Legursky* at Syl. Pts. 3 & 4.
33. In regard to the second prong of the test, the reviewing court must determine whether counsel's deficient performance adversely affected the outcome in a given case. *State ex rel. Myers v. Painter*, 213 W.Va. at 36. More importantly, a petitioner must demonstrate that the complained of deficiency or errors of counsel resulted in prejudice or a

“reasonable probability” that in the absence of error the result would have been different.

Id. Finally, “[i]n deciding ineffective assistance of counsel claims, a court need not address both prongs of the conjunctive standard of *Strickland* and *Miller*, but may dispose of such a claim based solely on a petitioner’s failure to meet either prong of the test.” *State ex rel. Edgell v. Painter*, 206 W.Va. 168 (2002) (citing *State ex rel. Daniel v. Legursky*, 195 W.Va. 314).

34. Petitioner has failed to specify facts that prove that Mr. Sullivan’s performance was atypical under an objective standard of reasonableness. Furthermore, considering the facts and circumstances of the Petitioner’s case, there is no reasonable probability that, but for these alleged errors, the outcome would have been different.
35. Petitioner also alleges that he was denied a fair cross-section of the community because there was one (1) African American on the jury pool. The United States Supreme Court provides the standard for the fair cross-section doctrine:

It should also be emphasized that in holding that petit juries be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are entitled to a jury of any particular composition, but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

(*See State v. Hobbs*, 168 W.Va. 13 (1981)) (citing *Taylor v. Louisiana*, 419 U.S. 422, 538) (1975).

36. In order to prove that a particular method of jury selection does not comport with the Sixth Amendment guarantee of a fair cross-section of the community, the Petitioner must show: (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are

selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Hobbs*, 168 W.Va. at 24 (citing *Duren v. Missouri*, 439 U.S. 357) (1979).

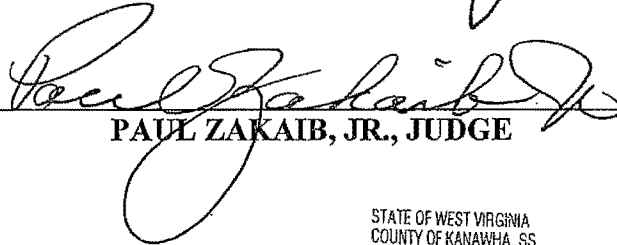
37. Petitioner has merely established that there was only one African American on the jury panel. Such evidence is insufficient to establish that a fair cross-section of the community had been excluded from the jury selection process.
38. Petitioner also challenges the opening statement given by the State of West Virginia. Specifically, he contends that the State's opening statement was misleading because it did not inform the jury of the pleas entered into by the co-defendants. West Virginia law establishes that "an attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction." *State v. Moose*, 110 W.Va. 476 (1931). Further, "it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deductible therefrom." *Id.*
39. In order to establish prosecutorial misconduct, the petitioner must show that the prosecutor's conduct was so egregious as to render his trial fundamentally unfair. *United States v. Young*, 470 U.S. 1 (1985).
40. The State of West Virginia had no duty to inform the jury during opening statements of the co-defendants' plea agreements or of any other weaknesses in its case. Mr. Sullivan, who represented Petitioner at trial, testified he had no standing for an objection. Moreover, Mr. Sullivan testified he had never seen a defense attorney object during an opening statement for something the prosecution *did not* say. Such argument is without

merit.

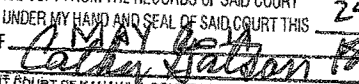
RESOLUTION

Based upon the foregoing findings of fact and conclusions of law, this Court **DENIES** the Petitioner's Amended Petition for Post-Conviction Writ of Habeas Corpus and **ORDERS** this action dismissed with prejudice. The Court notes the Petitioner's objections and exceptions to this ruling. The Court further **ORDERS** that the Clerk provide certified copies of this Order to counsel of record and Petitioner.

ENTERED THIS 20th day of May, 2011.



PAUL ZAKAIB, JR., JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24TH
DAY OF MAY 2011


CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK