STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Neil Williams,
Petitioner Below, Petitioner

vs.) No. 11-0889 (Ohio County 10-C-434)

David Ballard, Warden, Mount Olive Correctional Complex, Respondent Below, Respondent

FILED
September 21, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Neil Williams appeals, pro se, the May 6, 2011, order of the Circuit Court of Ohio County dismissing his petition for a writ of habeas corpus. The respondent warden, by C. Casey Forbes, his attorney, filed a response to which petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. 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 designated record,[1] the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On September 14, 1998, the Ohio County Grand Jury indicted petitioner upon fifty-two counts relating to child sexual offenses. Specifically, the indictment included the following:

> Seventeen counts of sexual assault in the third degree;
> Nineteen counts of sexual abuse in the third degree;
> Seven counts of exhibiting obscene material to a minor;
> Five counts of photographing a minor in sexually explicit conduct;
> Three counts of sexual abuse by a parent, guardian, or a custodian;
> and One count of sexual abuse in the first degree.

The indictment stated that the offenses occurred in July of 1998 as to forty-three counts. As to the remaining nine counts, the offenses were said to have occurred between October of 1997 and December of 1997. No victim was identified by name. Instead, the indictment indicated that each victim's name was known to the Grand Jury.

[1] This Court granted a motion to proceed on a designated record on October 19, 2011.

On November 17, 1998, petitioner entered a guilty plea to fourteen counts of the indictment pursuant to a plea agreement. The fourteen counts included twelve felonies and two misdemeanors. Specifically, petitioner pled guilty to eight counts of sexual assault in the third degree; one count of sexual abuse in the third degree; two counts of sexual abuse by a parent, guardian, or a custodian; one count of exhibiting obscene material to a minor; one count of sexual abuse in the first degree; and one count of photographing a minor in sexually explicit conduct. The remaining counts of the indictment were dismissed.

On February 2, 1999, the circuit court sentenced petitioner to nine terms of one to five years, two terms of ten to twenty years, one term of ten years, one term of six months and one term of ninety days. Some of the terms were to be served consecutively and some were to be served concurrently.

The circuit court re-sentenced petitioner on August 26, 1999, for the purposes of appeal. Petitioner's appellate counsel raised the following assignments of error: (1) Whether the indictment was fatally defective because it failed to name or otherwise identify the alleged victims of the offenses that it charged; (2) whether the indictment was fatally defective because it failed to provide sufficient facts to inform petitioner of the nature and cause of the charges against him or to permit him to raise Double Jeopardy as a defense to subsequent prosecution; (3) whether the circuit court erred in accepting petitioner's involuntary guilty plea at a hastily-convened plea hearing; and (4) whether the circuit court erred in denying petitioner's two pre-sentence motions to withdraw his involuntary guilty plea. This Court refused petitioner's direct appeal by an order entered March 23, 2000.

On October 22, 2000, petitioner filed a petition for a writ of habeas corpus, and the circuit court appointed him counsel. Habeas counsel filed a second amended petition for a writ of habeas corpus on June 6, 2003. The respondent warden filed his response on June 12, 2003. Subsequently, in a July 21, 2005, agreed order to correct sentence, the circuit court held that under the statute in effect at the time, the applicable sentence for sexual abuse by a parent, guardian, or a custodian was five to fifteen years. Thus, the circuit court found that petitioner had been sentenced to two illegal ex post facto terms of ten to twenty years under the current version of the statute for the two convictions for sexual abuse by a parent, guardian, or a custodian. The court re-sentenced petitioner to two five to fifteen terms on each of those counts, to be served consecutively to each other. The circuit court later denied all other habeas relief by an order entered November 8, 2005. When petitioner appealed pro se, this Court refused his appeal on December 6, 2006.

On March 30, 2009, petitioner filed pro se a Rule 35(a) motion to reduce sentence the circuit court construed as a petition for a writ of habeas corpus and dismissed the same by an order entered April 8, 2008. The circuit court found that "the grounds for relief the Petitioner has asserted have been previously and finally adjudicated or waived pursuant to [the 07/21/05 agreed order to correct sentence]." When petitioner appealed, this Court refused his appeal on November 19, 2009.

On December 10, 2010, petitioner filed a third petition for a writ of habeas corpus. Habeas

counsel was appointed, who filed an amended petition and a *Losh* checklist of grounds post-conviction habeas corpus relief on April 19, 2011.[2] The respondent warden filed his response on May 2, 2011. On May 6, 2011, the circuit court dismissed petitioner's petition without a hearing concluding that "the grounds for relief the Petitioner has asserted have been previously and finally adjudicated or waived."

Petitioner has appealed the circuit court's May 6, 2011, order dismissing his third petition. On June 3, 2011, petitioner filed an original jurisdiction petition for mandamus in this Court to compel the circuit court to appoint him appellate counsel. This Court refused the mandamus petition on September 22, 2011. Petitioner filed his merits brief on October 25, 2011. The respondent warden subsequently filed his response brief to which petitioner filed a reply. On May 17, 2012, petitioner filed a motion for appointment of appellate counsel, which is pending.

PETITIONER'S MOTION FOR APPOINTMENT OF APPELLATE COUNSEL

In requesting that he be appointed appellate counsel, petitioner argues that he is an incarcerated individual who has been determined to be an indigent person and that he is also a lay person who is ignorant of the procedures of this Court. This Court has previously denied a request by petitioner for appointment of appellate counsel when it refused his mandamus petition to compel the circuit court to appoint him appellate counsel. After careful consideration, this Court concludes that petitioner's request should once again be and is hereby denied.

DISPOSITION OF PETITIONER'S APPEAL FROM THE DISMISSAL OF HIS THIRD HABEAS PETITION

The standard for this Court's review of the circuit court's order denying petitioner's third habeas petition is set forth 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.

On appeal, petitioner argues that the circuit court should be reversed and his case remanded for a habeas corpus hearing and appointment of counsel because of various issues.[3] The respondent

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[2] *See Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

[3] Petitioner has never had a habeas corpus hearing, but he has twice had habeas counsel appointed. In his first habeas proceeding, petitioner obtained partial relief as result of the July . . . . . 21, 2005, agreed order to correct sentence. Because petitioner has never had a habeas hearing,

warden argues that petitioner's grounds for relief are not recognizable in habeas corpus and/or are frivolous. The respondent warden cites *Markley v. Coleman*, 215 W.Va. 729, 601 S.E.2d 49 (2004), for the proposition that "[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. 3, *Markley* (quoting Syl. Pt.1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973)). After careful consideration, this Court concludes that the circuit court did not abuse its discretion in dismissing petitioner's third habeas petition.

For the foregoing reasons, we find no error in the decision of the circuit court and its order denying petitioner's petition for a writ of habeas corpus is affirmed.

Affirmed.

ISSUED: September 21, 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

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however, the respondent warden acknowledges that the circuit court should not have dismissed petitioner's third petition on the basis that his grounds had been previously and finally adjudicated. The respondent warden correctly argues that "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 1, *State ex rel. Gordon v. McBride*, 218 W.Va. 745, 630 S.E.2d 55 (2006) (Internal quotations and citations omitted.).