

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

**Richard Paulding,
Petitioner Below, Petitioner**

vs) **No. 11-1000** (Cabell County 10-C-445)

**Marvin Plumley, Warden,
Respondent below, Respondent**

FILED

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

MEMORANDUM DECISION

Petitioner Richard Paulding, by counsel A. Courtenay Craig and John A. Proctor, appeals the Circuit Court of Cabell County's order entered on May 31, 2011, denying petitioner habeas corpus relief. Warden¹ Plumley, by counsel C. Casey Forbes, has filed a response.

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 was convicted by a jury of five counts of third-degree sexual assault and one count of attempted sexual assault. No direct appeal has been filed, although petitioner has been resentenced twice for purposes of a direct appeal. Petitioner filed a petition for writ of habeas corpus in the circuit court, arguing insufficient evidence, cumulative error, and ineffective assistance of counsel. After an omnibus hearing, the petition for writ of habeas corpus was denied.

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

¹ Pursuant to Rule 41(c) of the West Virginia Revised Rules of Appellate Procedure, we have replaced the respondent's name with Marvin Plumley, Warden. The initial respondent on appeal, Teresa Waid, is no longer the warden at Huttonsville Correctional Center. This Court notes, however, that petitioner is currently housed at Denmar Correctional Center.

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).

Petitioner first argues that there was insufficient evidence to convict him on all six counts. However, this Court has found as follows:

Except in extraordinary circumstances, on a petition for habeas corpus, an appellate court is not entitled to review the sufficiency of the evidence. *Riffle v. King*, 302 F. Supp. 992 (N.D.W.Va. 1969), and *Young v. Boles*, 343 F.2d 136 (4th Cir. 1965). That question is an appropriate one for review on appeal.

Cannellas v. McKenzie, 160 W.Va. 431, 436, 236 S.E.2d 327, 331 (1977). Finding no extraordinary circumstances in this matter, this Court will not review the sufficiency of the evidence, finding this assignment of error more suited for direct appeal.

Petitioner also argues that counsel was ineffective in numerous ways, and but for these cumulative errors, petitioner would have received a fair trial and the outcome of the trial would have been different. Petitioner argues that his counsel failed to gather alibi evidence, failed to utilize a certain photograph as evidence, and failed to obtain all of the victim's medical records. He also argues that counsel failed to object properly. The State argues that there were not cumulative errors in this action, and that petitioner's counsel was not ineffective. Moreover, many of counsel's actions were dictated by trial strategy, and different actions would not have affected the outcome of the trial. Having reviewed the circuit court's "Amended Findings of Fact and Conclusions of Law Denying Petition for Writ of Habeas Corpus" entered on May 31, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to this assignment of error. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

Finally, petitioner argues that the circuit judge failed to maintain his role as a neutral arbiter during the habeas proceedings and thus denied him a fair proceeding. Petitioner argues that the fact that the judge asked many different questions to witnesses shows that he was acting in the role of a prosecutor rather than a judge. The State argues that petitioner does not give a single instance of biased conduct, but relies merely on the number of questions asked by the judge. After a careful review of the transcripts in this matter, this Court finds no evidence that the circuit judge was biased against the petitioner or acted in any manner that was not neutral.

For the foregoing reasons, we affirm the circuit court's decision. This Court also directs the circuit court to resentence petitioner for purposes of a direct appeal, and directs petitioner's counsel to file a direct appeal within thirty days of the resentencing.

Affirmed.

ISSUED: November 19, 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

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA
FILED

RICHARD PAULDING,
 Petitioner,

2011 MAY 31 P 2:16

ADELL CHANDLER
 CIRCUIT CLERK
 CABELL CO., WV

v.

Civil Case No. 10-C-445
 Judge Ferguson

TERESA WAID, WARDEN OF THE
 HUTTONVILLE CORRECTIONAL CENTER
 Respondent.

**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW DENYING
 PETITION FOR WRIT OF HABEAS CORPUS**

On the day 24th day of September 2010 came the Petitioner in person and by his counsel Courtney Craig and John Proctor, also came the Respondent, by her counsel assistant prosecuting attorney Doug Reynolds. This matter being set on the Court's docket for an omnibus habeas corpus hearing.

The Court Finds the petitioner has completed the Losh Checklist and waived any attorney client privilege with his prior trial counsel Mr. Vic Navy.

The Court further Finds that the Trial Court Jury did not abuse its discretion in **returning convictions to all six counts in the aforementioned indictment. A jury verdict** should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilty beyond a reasonable doubt. *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). While the petitioner may have disagreed with the persuasiveness of the victim's testimony, the jury did have an adequate basis to find the petitioner guilty of all six counts.

The Second contention that the petitioner raises is the presence of cumulative errors in his trial. First, the petitioner raises the issue of the timeliness of particular disclosures by the State in the case pursuant to *State v. Youngblood*, 650 SE2d 119 W.Va. (2007).. However, the Court Finds the State informed Mr. Navy as soon as agents of the state become aware of any discovery. Furthermore, Mr. Navy testified that this late disclosure had no effect on the trial strategy or compromised the petitioner's case.

Next, the Court Finds no error in the handling of the psychiatric or medical records on behalf of the State or the Court. The petitioner claims error by the Court in reviewing the psychiatric records of Ms. Clark for her treatment with Ms. Mynes, before they were given to Mr. Navy before his cross examination of Ms. Mynes; as well as her records of treatment at Pretera that the State did not have knowledge of until after the trial, and were provided at that time. Once again the Court Finds the petitioner has presented no evidence the information in this record compromised his case. Finally, the petitioner faults the Court with failing to sua-sponte strike a single hearsay statement of Trooper Lively with the declarant Shannon Clark saying, "I thought I saw something". While the statement may have been or not admissible it is no way clear to what the declarant meant. Clearly Mr. Navy waived the objection and this waiver the court will address in the final portion of this order.

Lastly, the Court Finds that the petitioner has failed to show that his trial counsel was constitutionally deficient. The test for the inadequacy of counsel is found in *State v. Miller*, 194 WVa. 3, 458 SE2d 114 (1995), most recently updated and articulated in *State ex rel Bowers v. Scott*, 226 W.Va. 130, 697 SE.2d 122 (2010). This test requires: (1) trial counsel's performance to be deficient under an objective standard of reasonableness; (2)

that there is a reasonable probability that, but for counsel's unprofessional the result of the proceedings would have been different.

The Court Finds that Petitioner privately hired Mr. Navy and after he expended all his personal resources appointed Mr. Navy at the petitioner's request and at all times served at the Petitioner's will and pleasure.

The primary complaint on the petitioner was that Mr. Navy gave a friend a note pad and told them to think of questions for a witness. The Court Finds this friendly gesture to keep a friend of the family engaged in no way violates any rule of professional conduct nor in any way harmed the Petitioner.

A second contention was that Mr. Navy should have introduced evidence of deformities with the Petitioner's genitalia. The Court finds that the petitioner and his counsel carefully weighed the risks of cross-examining the complaining witness and introducing direct evidence on this subject. The Court further finds that the petitioner himself decided against this strategy based on the risks involved in proffering this type of evidence. Clearly, the fact counsel "lost" the picture could have been cured with a camera since the growth persists to this day.

The Petitioners final claim is that Mr. Navy voiced only one objection during the trial and more particularly didn't object to Trooper Lively's statement by declarant Shannon Clark. The Court Finds that Mr. Navy made strategic decision to not object to draw more attention to the statement. Mr. Navy gave ample reasoning based on the age of the victim, and what he felt was the strength of the petitioner's testimony that he had established reasonable doubt.

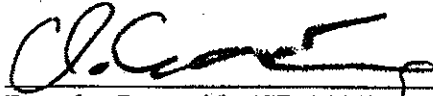
Furthermore, the court Finds that petitioner fails to meet the second prong of the Strickland Test. Even assuming Mr. Navy would have made every conceivable objection and those would have been sustained by the Court it would have very unlikely affected the outcome of the trial.

It is therefore the ORDER of the Court that the Petitioner's writ be Dismissed with prejudice and this matter be removed from the active docket of this court. Furthermore, the Clerk shall forward a copy of this ORDER to all Counsel of Record.

ORDER
ENTER


Alfred Ferguson, Circuit Judge

Prepared by


Douglas Reynolds (SB 9098)
Assistant Prosecuting Attorney
Cabell County Courthouse
Huntington, W.V. 25701

ENTERED Circuit Court Civil Order Book

No. _____ Page _____ this

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON _____

GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS _____

 CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA