

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

**Jessie Davis,
Petitioner Below, Petitioner**

vs.) No. 11-1062 (Mingo County 09-C-273)

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

FILED

December 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jessie Davis, *pro se*, appeals the May 5, 2011 order of the Circuit Court of Mingo County denying his sixth petition for a writ of habeas corpus in which he argued ineffective assistance of habeas counsel and newly discovered evidence. The respondent warden, by Thomas W. Rodd, his attorney, filed a summary 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, 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.

On February 28, 1995, a Mingo County jury found petitioner guilty of four counts of first degree sexual abuse and four counts of sexual abuse by a parent, guardian, or custodian. The circuit court subsequently sentenced him to a term of thirty-five to eighty-five years in the state penitentiary. Petitioner is currently incarcerated at the Mount Olive Correctional Complex in Mount Olive, West Virginia.

Prior to his instant habeas corpus proceeding, petitioner had an omnibus hearing on February 8, 1999, in connection with his first such proceeding. Habeas counsel submitted a *Losh* checklist indicating each and every ground that petitioner felt might entitle him to relief.¹ The circuit court inquired on the record whether habeas counsel had discussed with petitioner all grounds that might apply to his case and that any grounds not raised would be deemed voluntarily and intentionally waived. Habeas counsel advised the circuit court that he had discussed with his

¹ See *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

client every potential ground for relief in habeas corpus and had explained the conclusive effect of a final decision on subsequent petitions for habeas relief. Petitioner signed the *Losh* checklist submitted by his counsel and initialed all the grounds he wished to assert. The circuit court accepted the checklist, admitted it into the record, and accordingly found that petitioner had knowingly and intelligently waived all grounds to habeas corpus relief not asserted by petitioner in the proceeding before the circuit court.

On March 19, 1999, the circuit court entered a final order denying all substantive grounds for relief prayed for in petitioner's petition with the exception of the ground alleging that petitioner had been sentenced under the wrong statute, which the court granted. Petitioner was subsequently resentenced under the correct statute in effect at the time of the commission of the crimes for which he was convicted.

In his instant habeas proceeding, an omnibus hearing occurred on April 4, 2011, and continued on April 25, 2011, where he was represented by counsel.² On the issue of ineffective assistance of prior habeas counsel, petitioner wanted to present testimony of his trial counsel, and his counsel explained as follows: "If we have to walk thru the complicated chain we will. It's going to be that habeas counsel failed to recognize that the trial counsel failed to recognize that there was this atmosphere of bias and the trial court made bad decisions for this defendant, so it's three steps we'll move thru, yes."

However, after taking a recess to review the records of petitioner's prior habeas proceedings, the circuit court ruled as follows:

So, based upon all those matters, every opportunity has been given in the past to fully litigate all those issues and they, in fact, have been litigated. The omnibus proceeding has already been held. Therefore, we are holding this proceeding as a subsequent habeas proceeding and the Court finds that all the issues that are set forth in the transcript with regard to actions by trial counsel, actions by the trial court, actions by the prosecuting attorney, by the jury, and by the spectators all were fully litigated or and raised and decided and appealed or they could have been with reasonable diligence because they were set forth in the transcript and all those issues were raised, litigated and decided.

In inquiring whether there was any reason to further detain petitioner's trial counsel at the hearing, the circuit court further found that "[s]he did an outstanding job at the time of the trial and that's reflected in the transcript and the court has already found that in an omnibus proceeding and habeas proceeding as to [prior habeas counsel], so those are all issues that have been fully

² According to the circuit court, petitioner also filed a *Losh* checklist in connection with his instant habeas proceeding.

litigated.” The circuit court subsequently released petitioner’s trial counsel from her subpoena and excused her.

The hearing continued on the issue of newly discovered evidence. Petitioner planned on calling Kyle Sammons to testify about comments petitioner’s son had alleged made to him that tended to support petitioner’s claim of innocence. The comments, if true, would represent a change from petitioner’s son’s testimony at trial.

Before petitioner’s trial counsel was excused, the Prosecuting Attorney stipulated to the fact that the evidence petitioner wanted to present was consistent with what petitioner told his trial counsel about his claimed innocence. Thereafter, petitioner called Mr. Sammons. The Prosecuting Attorney objected on the ground of hearsay. Petitioner’s counsel argued Mr. Sammons’s testimony should be allowed because the comments petitioner’s son had made to him constituted statements against his son’s interest because it contradicted his son’s testimony at trial.³ The circuit court sustained the Prosecuting Attorney’s hearsay objection and excused Mr. Sammons.

After Mr. Sammons was excused, Mr. Davis presented the testimony of his stepdaughter—the victim⁴—and his former wife. Both stood by their trial testimony. When questioned by petitioner’s counsel, his stepdaughter testified as follows:

* * *

Q So if someone else said that you and your mother would laugh and joke about what happened to [petitioner] –

A - That’s nothing to laugh about – the molestation of a child.

Q So that wouldn’t be true?

A No.

Q And you’ve never joked about putting an innocent man in jail?

A Never[.]

* * *

Q So you understand that this is your last chance that if any of

³ Petitioner’s son would have been a child when he testified at his father’s trial.

⁴ As reflected in the testimony of petitioner’s stepdaughter, petitioner’s sexual abuse of his stepdaughter occurred from the time she was five years old until the time she was eight years old. Petitioner’s stepdaughter was eight years old when she originally testified at trial.

that was untrue that this is our last chance to get thru that?

A I will never change my statement. It happened, and I'll take a lie detector test. A five year old does not get Chlamydia at five if something did not happen to her.

The victim's mother responded to Mr. Davis's counsel's questions as follows:

* * *

Q If someone else were to say that you and [victim] would laugh and joke about putting an innocent man in jail, is that true?

A No, it isn't.

Q Do you know why someone would say something like that?

A I have no idea.

Q You understand that this is the last opportunity if anything was said at trial that isn't true to correct that? Do you feel that anything was said at trial that isn't true?

A No.

Q So you stand by your testimony then and today?

A Yes.

In its May 5, 2011 order denying petitioner's sixth petition for a writ of habeas corpus, the circuit court found that "[t]he witnesses both testified that their trial testimony was truthful, and testified that their testimony did not need changed or updated." The circuit court further found that "[t]he Petitioner failed to submit any arguments or evidence in support of his [claim] of ineffective assistance of [habeas] counsel."

STANDARDS OF REVIEW

The circuit court's order denying petitioner's sixth habeas petition and the underlying findings supporting the order are entitled to deference:

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.

Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). The circuit court's evidentiary ruling that Mr. Sammons's testimony as inadmissible hearsay is also entitled to deference. See Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998) ("A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.").

DISCUSSION

Petitioner asserts that the circuit court clearly erred in not conducting a full and fair hearing on his claim of ineffective assistance of prior habeas counsel. Petitioner asserts that the circuit court clearly erred in finding that Mr. Sammons's testimony was inadmissible hearsay. Petitioner argues that the circuit court abused its discretion in denying his sixth habeas petition. In response, the respondent warden argues that following the hearing in the instant habeas proceeding, the circuit court properly concluded that there was no newly discovered evidence showing petitioner's innocence and that petitioner's claim of ineffective assistance of prior habeas counsel had previously been adjudicated. The respondent warden asserts that Mr. Sammons's testimony was properly excluded and that there was no proffer of what Mr. Sammons's testimony would regard.

Both the victim and the victim's mother were called as witnesses at the habeas hearing and were questioned whether they ever laughed about putting an innocent man in prison. Each stood by their trial testimony. Therefore, the testimony presented only reinforced petitioner's guilt. Accordingly, after careful consideration, this Court concludes that the circuit court did not abuse its discretion in denying petitioner's sixth habeas petition.

For the foregoing reasons, we find no error in the decision of the Circuit Court of Mingo County and affirm its May 5, 2011 order denying petitioner's sixth petition for a writ of habeas corpus.

Affirmed.

ISSUED: December 7, 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