STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State ex rel. David Munday,
Petitioner Below, Petitioner

vs) No. 11-1205 (Berkeley County 06-C-70)

Thomas McBride, Warden,
Respondent Below, Respondent

FILED
June 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner David Munday, by counsel, Christopher Prezioso, appeals the circuit court's orders dated March, 3, 2011, and July 20, 2011, denying his petition for writ of habeas corpus. The State has filed its response, by counsel Christopher Quasebarth. Petitioner has filed a reply.

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 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 found guilty by a jury of three counts of burglary; five counts of wanton endangerment; one count of unlawful assault on a police officer; four counts of attempted second degree murder; two counts of brandishing; three counts of discharge of firearm within 500 feet of a dwelling place; one count of destruction of property; one count of assault; and, one count of fleeing from an officer on foot. The State filed a recidivist information, and a jury found that petitioner had twice been convicted of offenses for which he could have been sentenced to the penitentiary. Therefore, his conviction for unlawful assault on a police officer was enhanced to a life sentence. His total sentence was seven to fifty-seven years in the penitentiary, followed by a consecutive sentence of fifteen years to life in prison. Petitioner then filed a direct appeal, which was refused by this Court. Thereafter, he filed a petition for writ of habeas corpus. The circuit court reviewed the petition, and issued a lengthy order entered on March 3, 2011, denying relief on most counts, but requesting additional briefing on the issue of whether the recidivist statute was properly applied in this matter. Both sides briefed the issue, and the circuit court then issued a final order denying the petition for writ of habeas corpus on July 20, 2011. The circuit court determined that no evidentiary hearing was necessary.

Petitioner now appeals the denial of his habeas corpus petition below.

> 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).

Petitioner argues several assignments of error on appeal. First, he argues that the circuit court erred in denying his petition for writ of habeas corpus without conducting an evidentiary hearing, as probable cause existed to believe that petitioner was entitled to relief. Petitioner argues that he met the "probable cause" standard pursuant to West Virginia Code § 53-4A-7(a) and was entitled to an evidentiary hearing. The State argues that no hearing was necessary when the reviewing court could base its decision on the record, the underlying criminal case, or any other proceeding in which petitioner sought relief.

This Court has previously addressed the denial of a writ of habeas corpus without holding a hearing, as follows:

> "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. 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

Syl. Pt. 2, *State ex rel. Watson v. Hill*, 200 W.Va. 201, 488 S.E.2d 476 (1997). In the present matter, the circuit court did not err in failing to hold an evidentiary hearing. A review of the record presented and of the circuit court's orders show that the circuit court properly determined that petitioner was not entitled to relief without the necessity of a hearing.

Petitioner also argues many of the issues he asserted before the circuit court in his petition for writ of habeas corpus. These alleged errors include the following: insufficient evidence to sustain a conviction; ineffective assistance of counsel; petitioner's competency at trial; failure to suppress and exclude certain evidence; improper comments by the prosecutor at trial; reference to petitioner's prior periods of incarceration; improper jury selection; false and/or unreliable testimony; and improper denial of a change of venue. The State has responded to each allegation, arguing in favor of the circuit court's findings.

The Court has carefully considered the merits of each of petitioner's arguments as set forth in his petition for appeal. Finding no error in the denial of habeas corpus relief, the Court fully incorporates and adopts Part II of the circuit court's detailed and well-reasoned "Order Demanding Additional Briefing on Certain Counts and Granting Final Denial on Certain Counts of Petition for Writ of Habeas Corpus" dated March 3, 2011, and attaches the same hereto.

Finally, petitioner argues that the circuit court erred by dismissing petitioner's amended petition for writ of habeas corpus when the West Virginia Recidivist Statute found at West Virginia Code § 61-11-18 was improperly applied to petitioner's case as petitioner had not been convicted of two predicate felonies which would require petitioner to be sentenced to life under said statute.

The Court has carefully considered the merits petitioner's arguments regarding the application of the recidivist statute, as set forth in his petition for appeal. Finding no error in the denial of habeas corpus relief on this issue, the Court fully incorporates and adopts the circuit court's detailed and well-reasoned "Final Order Denying Petition for Writ of Habeas Corpus," dated July 20, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 25, 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

-11-1205

C Prezioso

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Division II

STATE OF WEST VIRGINIA, ex rel.
DAVID MUNDAY,

Petitioner,

v.

CIVIL CASE NO. 05-C-4; 06-C-70
Underlying Criminal Action
Numbers: 03-F-75
JUDGE WILKES

THOMAS MCBRIDE, Warden,
Mount Olive Correctional Complex,

Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This matter came before the Court this 20 day of July 2011, pursuant to this Court's Order Demanding Additional Briefing on Certain Counts and Granting Final Denial on Certain Counts of Petition for Writ of Habeas Corpus. Upon the appearance of Petitioner, David Munday, by counsel Christopher Prezioso, and Respondent, Thomas McBride, by counsel Christopher C. Quasebarth.

Findings of Fact

1. On February 21, 2003, Petitioner, David Munday, was charged by Indictment of twenty-eight (28) violations of West Virginia law. Under the Indictment Petitioner was charged with seventeen (17) felony counts, which included three counts of Burglary, three counts of Kidnaping, six counts of Wanton Endangerment with a Firearm, one count Malicious Wounding of a Law Enforcement Officer, four counts of Attempted Murder. In addition the Indictment

listed eleven (11) misdemeanor counts, which were four counts of Brandishing a Firearm, three counts of Discharge of a Firearm within 500 feet of a Dwelling, one count Domestic Battery, one count Destruction of Property, one count Assault, and one count Fleeing on Foot from Law Enforcement.

2. The underlying case was styled State of West Virginia v. David Munday, Berkeley County Circuit Court Case No. 03-F-75. For all pre-trial and trial matters Petitioner was represented by both Margaret Gordon and Robert Barrat.

3. On October 30, 2003, the jury issued their Verdict, where upon Petitioner was convicted of three counts of Burglary, five counts of Wanton Endangerment, the lesser felony of Unlawful Assault on a Police Officer, four lesser felonies of Attempted Second Degree Murder, two misdemeanor counts for Brandishing, three counts for Discharge of a Firearm within 500 feet of a Dwelling Place, one count of Destruction of Property, one count of Assault, and one count of Fleeing from an Officer on Foot. The Jury's Verdict did acquit the Petitioner of the three indicted counts of Kidnaping and the indicted count of Domestic Battery.

4. On November 20, 2003, the State filed a Recidivist Information against Petitioner seeking to enhance his conviction for unlawful assault on a police officer due to two prior convictions against Petitioner. The trial court considered Petitioner's Motion to Dismiss the Recidivist Information, and the trial court denied the motion on January 5, 2004.

5. On January 8, 2004, a jury found that Petitioner had been twice previously convicted of offenses for which he could have been sentenced to the penitentiary, thus his conviction for unlawful assault on a police officer was enhanced to a life sentence.

6. On February 2, 2004, a sentencing hearing was held where Petitioner, David Munday, was sentenced by the Circuit Court of Berkeley Count, West Virginia, as follows: one

to fifteen (1 to 15) years on each of the three Burglary counts, each to run consecutive; five (5) years on each of the five Wanton Endangerment counts, each to run consecutive; one to three (1 to 3) years on each of the four counts for Attempted Murder in the Second Degree, each to run consecutively; one (1) year for each of the two counts of Brandishing, which was ordered to run concurrent with Wanton Endangerment sentence; one hundred (100) days for each of the three counts of Discharging a Firearm within 500 feet of a Dwelling, which were to run concurrent with the Wanton Endangerment sentence; one (1) year for Destruction of Property, which was to run concurrent with the Burglary sentence; six (6) months for Assault, to run concurrent with the Wanton Endangerment sentence; one (1) year for Fleeing a Police Officer by Means other than a Vehicle, to run concurrent with all other counts; and finally a life sentence, with mercy, for Unlawful Assault on a Police Officer, after applying the recidivist enhancement, which was ordered to run consecutively to all other sentences. Therefore, Petitioner's total sentence was and indeterminate sentence of not less than seven (7) nor more than fifty-seven (57) years, followed by a consecutive sentence of fifteen (15) years to natural life.

7. On March 3, 2011, this Court issued its Order Demanding Additional Briefing on Certain Counts and Granting Final Denial on Certain Counts of Petition for Writ of Habeas Corpus, in which the Court denied all claims in Petitioner's Petition for Writ of Habeas Corpus except for the claim for relief that Berkeley County Wrongfully Applied the Recidivist Statute. On the final remaining claim, the Court sought additional briefs by both parties. Those briefs have been submitted and the Court has reviewed the same in order to review this final claim fully under the rules set out for habeas corpus relief.

Conclusions of Law

This matter comes before the Court upon the final remaining claim under Petitioner's Petition for Writ of Habeas Corpus. The procedure surrounding petitions for writ of habeas corpus is "civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case." W. Va. Code § 53-4A-1(a); *State ex rel. Harrison v. Coiner*, 154 W. Va. 467 (1970). A habeas corpus proceeding is markedly different from a direct appeal or writ of error in that only errors involving constitutional violations shall be reviewed. *Syl. Pt. 2., Edwards v. Leverette,* 163 W. Va. 571 (1979).

> "If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or the record in the proceedings which resulted in the conviction and sentence . . . show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall enter an order denying the relief sought." W. Va. Code § 53-4A-7(a).

If the court upon review of the petition, exhibits, affidavits, or other documentary evidence is satisfied that the petitioner is not entitled to relief the court may deny a petition for writ of habeas corpus without an evidentiary hearing. *Syl. Pt. 1, Perdue v. Coiner,* 156 W. Va. 467 (1973); *State ex rel. Waldron v. Scott*, 222 W. Va. 122 (2008). Upon denying a petition for writ of habeas corpus the court must make specific findings of fact and conclusions of law as to each contention raised by the petitioner, and must also provide specific findings as to why an evidentiary hearing was unnecessary. *Syl. Pt. 1, State ex rel. Watson v. Hill*, 200 W. Va. 201 (1997); *Syl. Pt. 4., Markley v. Coleman*, 215 W. Va. 729 (2004); R. Hab. Corp. 9(a). On the other hand, if the Court finds "probable cause to believe that the petitioner may be entitled to some relief . . . the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds (in fact or law) advanced . . . ." W. Va. Code § 53-4A-7(a).

The final remaining claim to be addressed by the Court under the standards set out for review of a Petition for Habeas Corpus is Petitioner's claim that the Recidivist Statutes were wrongfully applied in his case. Petitioner argues two defects in his sentencing. First, Petitioner argues that he has not yet finished serving the complete sentences of the previous crimes which were used to enhance his sentence in this case. Second, Petitioner argues that the crimes for which he was previously convicted, which were used to enhance his current sentence, are misdemeanors in Maryland. The first contention by Petitioner is not supported by law, and the Court finds no support for the argument that one must complete their prior sentence before that crime may be used as an enhancement. The act which led to his second conviction, which occurred in 2000, is distinct from the criminal acts underlying the case at hand. The more developed claim by Petitioner is the contention that his prior convictions were misdemeanors in Maryland, and therefore do not qualify under West Virginia's recidivist statute. The West Virginia recidivist statute provides:

> "(a) Except as provided by subsection (b) of this section, when any person is convicted of an offense and is subject to confinement in the state correctional facility therefor, and it is determined, as provided in section nineteen of this article, that such person had been before convicted in the United States *of a crime punishable by confinement in a penitentiary*, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under such sentence.
>
> . . .
>
> (c) When it is determined, as provided in section nineteen of this article, that such person shall have been twice before *convicted in the United States of a crime punishable by confinement in a penitentiary*, the person shall be sentenced to be confined in the state correctional facility for life." W. Va. Code § 61-11-18 (2010) (Emphasis Added)

Based on the clear language of the statute Petitioner has put an improper focus on the classification of the previous crimes as misdemeanors or felonies. While all "crimes punishable by confinement in a penitentiary" in West Virginia are felonies, not all states classify crimes in the same manner. Therefore, simply because a crime is a misdemeanor in another state it does not end the Court's review of the propriety of an enhanced sentence. Furthermore, Petitioner's has improperly focused on the classification of the crime by the state in which he was sentenced. In applying the recidivist statute in West Virginia, the West Virginia Supreme Court of Appeals has directed courts to focus on West Virginia's classification of a crime and not that of the situs state. "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).

In *Justice v. Hedrick*, the Court addressed the issue of whether a conviction in Michigan for attempted breaking and entering was a proper prior convition to be used in enhancing a person's sentence. The Court found two problems with the use of the prior conviction in that case. First, when the person committed the attempted breaking and entering in Michigan, in West Virginia they would have been prosecuted under "a petition alleging that the child is a delinquent child." *Id.* at 55. The Court focused on the classification of the crime as it would have been prosecuted in West Virginia, and found that the Michigan conviction did not qualify. *Id.* at 56. The second issue addressed by the Court was the fact that in Michigan attempted breaking and entering "constituted a felony[, h]owever, in West Virginia that offense is classified as a misdemeanor." *Id.* The Court found that it was "proper that the laws of this State should be considered in determining the grade of the crime for which there have been former convictions."

Id. (Citing *State v. Lawson*, 125 W. Va. 1, 22 S.E. 2d 643 (1942).

The Court has applied the same approach of following West Virginia's classification of the crime in alternate contexts as well. For example, in the context of enhanced penalties for subsequent domestic violence convictions the Court looked to how the prior act would have been prosecuted in West Virginia to determine if it qualified as a prior conviction.

> "An out-of-state conviction may be used as a predicate offense for penalty enhancement purposes under subsection (c) of West Virginia Code § 61-2-28 (1994) (Repl.Vol.2000) provided that the statute under which the defendant was convicted has the same elements as those required for an offense under West Virginia Code § 61-2-28. When the foreign statute contains different or additional elements, it must be further shown that the factual predicate upon which the prior conviction was obtained would have supported a conviction under West Virginia Code § 61-2-28(a) or (b) in order to invoke the enhanced penalty contained in subsection (c)." *Syl. Pt. 2, State v. Hulbert,* 209 W. Va. 217, 544 S.E.2d 919 (2001).

The Court in this context found that it's not proper to simply rely on the out-of-state's classification of the crime, and also it is not proper to simply compare the form of West Virginia's statute with the out-of-state statute. A proper review requires a greater effort at looking at the facts that underlie the prior convictions and determine how those facts would be prosecuted under West Virginia's laws. Therefore, when looking at the case law relevant to the application of out-of-state convictions under West Virginia's recidivist statute, this Court finds that it is important to look to the laws of West Virginia to determine if the criminal activity for which the person was convicted in another state would lead to a conviction in West Virginia that carried a punishment of "confinement in the penitentiary," W. Va. Code § 61-11-18 (2010); regardless of how that criminal activity was classified or punished in the situs state.

Therefore, in the case at hand, the fact that Petitioner's crimes were classified as misdemeanors in Maryland has no bearing on their applicability as prior convictions under the

recidivist statute. In fact, Petitioner's prior crimes are a great example of why its improper to rely on another state's classification of a crime, because Maryland's criminal statutes are structured entirely differently than West Virginia's. Even though both prior crimes for which Petitioner was convicted in Maryland were classified as misdemeanors, they both carried sentences involving confinement in the penitentiary. On the other hand, looking only at the fact that Petitioner served a sentence of confinement in the penitentiary in Maryland would also be inadequate, since the proper focus is on how the underlying criminal activity would be prosecuted under the laws of West Virginia. Therefore the Court must look at each prior conviction and determine if the underlying criminal activity would be prosecuted in West Virginia.

The more recent conviction at issue occurred on April 26, 2000, when Petitioner was convicted of second degree assault and sentenced to eight (8) years in the Maryland division of corrections, suspending four (4) years, with two (2) years of supervised probation. The Court has access to the police report from this conviction, which states in relevant part that:

> "They located the subject at the rear of the bar. Deputy Fogle had already confirmed the subject to be wanted on a Maryland parole Commission Retake Warrant held by the Maryland Division of Correction.
>
> As the trooper and deputy approached the subject, he (the subject) picked up a beer bottle. According to the deputy, Trooper Stonestreet ordered the subject to put the bottle down and warned him that he (the trooper) would turn the canine loose. The subject allegedly said 'I kill dogs' and threw the beer bottle at Stonestreet. The bottle did hit the trooper causing minor injuries." *See* Petitioner's Additional Briefing on Issues Regarding Recidivist Proceeding, Exhibit 2.

Under West Virginia Code § 61-2-10b, "unlawful assault" is described as:

> "Any person who unlawfully but not maliciously shoots, stabs, cuts or wounds or by any means causes a government

> representative, health care worker or emergency service personnel acting in his or her official capacity bodily injury with intent to maim, disfigure, disable or kill him or her and the person committing the unlawful assault knows or has reasona to know that the victim is acting in his or her official capacity is guilty of a *felony and, upon conviction thereof, shall be confined in a correctional facility* for not less than two nor more than five years." W. Va. Code § 61-2-10b(c) (2010).

Looking at the factual situation underlying Petitioner's 2000 conviction, it is clear that at the very least Petitioner would be guilty of the felony of unlawful assault, and therefore would have been confined in the penitentiary, making his prior conviction a proper underlying conviction for the recidivist statute. Throwing a beer bottle at a police officer whom you know or reasonably should know is coming to pick you up on a warrant, wounding that officer, and then showing an intent to diable the officer to evade capture clearly fits under a West Virginia felony statute.

The older prior conviction was a 1989 conviction for the offenses of, Wearing and Carrying a Dangerous and Deadly Weapon and Assault and Battery. Upon a guilty plea Petitioner was sentenced to three years incarceration for the offense of Carrying a Dangerous and Deadly Weapon and ten years for the offense of Assault and Battery; wherein all but the time served was suspended and Petitioner was placed on 5 years supervised release. *See* Respondent's Supplemental Brief on Issue of Recidivist Sentence, Attachment A. While there is less information concerning this older conviction, there is sufficient information to show that this crime was not a simple battery, as argued by Petitioner, but instead is at least an "unlawful assault" under West Virginia law. Under W. Va. Code § 61-2-9, "malicious or unlawful assault," are defined as:

> "If any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury with intent to maim, disfigure, disable or kill, he shall, except where it is otherwise

> provided, be guilty of a felony and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall be guilty of a felony and, upon conviction, shall, in the discretion of the court, either be confined in the penitentiary not less than one nor more than five years . . . ." W. Va. Code § 61-2-9(a) (2010).

As to this particular conviction, focusing on the assault and battery, Petitioner was originally charge with, Assault with Intent to Murder and Assault with Intent to Maim, Disfigure, Disable. Furthermore, as to the portion of the conviction concerning assault and battery, Petitioner was sentenced to ten years confinement in the penitentiary, which was suspended for supervised release. While an out-of-state sentence is not dispositive on the issue of whether a prior conviction meets the standards of West Virginia recidivist statutes, the sentence can be indicative of the severity of the crime. When comparing the charging documents with the sentence ordered under Petitioner's 1989 conviction, the Courts finds sufficient indicia to show that the underlying factual situation would not lead to a West Virginia conviction of simply assault but instead would have lead to a conviction of at least unlawful assault, and possibly malicious assault, which would have carried the punishment of confinement in the penitentiary. Therefore, when looking closely at this conviction, the Court finds that it does satisfy the West Virginia recidivist statute, because under West Virginia law the underlying criminal activity would have been prosecuted under a statute carrying a penalty of confinement in the penitentiary.

Accordingly, Court DENIES Petitioner's claim for relief that Berkeley County Wrongfully Applied the Recidivist Statute, which means that at this point all of Petitioners claim in his Petition for Writ of Habeas Corpus have been DENIED with a finding by the Court that there is no need for an evidentiary hearing. The Court notes the objections and exceptions of the

parties to any adverse ruling herein.

Therefore it is hereby ADJUDED and ORDERED that as a FINAL ORDER Petitioner is not entitled to the relief requested under Petitioner's Petition for Writ of Habeas Corpus.

The Court directs the Circuit Clerk to distribute attested copies of this order to the following counsels of record:

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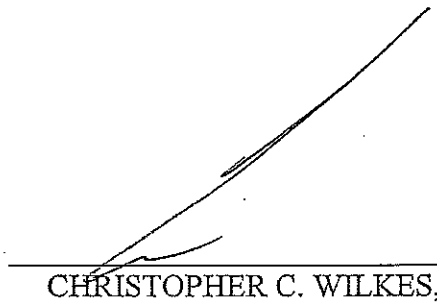

CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA