

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

**Benny K.,
Petitioner Below, Petitioner**

vs) **No. 11-1264** (Morgan County 05-P-2, 08-P-46)

**Marvin Plumley, Warden,
Respondent Below, Respondent**

FILED

October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Nicholas Forrest Colvin on behalf of Petitioner K¹, arises from the Circuit Court of Morgan County, wherein petitioner's petition for writ of habeas corpus was denied by order entered on August 5, 2011. Respondent Plumley², 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 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.

In April of 2003, petitioner was convicted by jury of three counts of sexual abuse by a guardian, three counts of incest, and three counts of third degree sexual assault. At sentencing, the trial court ordered petitioner to serve ten to twenty years in prison for each conviction for sexual abuse by a guardian, five to fifteen years in prison for each incest conviction, and one to five years in prison for each third degree sexual assault conviction, all sentences were to run

¹ Because the victim in the underlying case is petitioner's stepdaughter, who was a minor at the time, we follow our traditional practice in cases involving sensitive facts and use only petitioner's last initial. *See State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

² Pursuant to Rule 41(c) of the West Virginia Revised Rules of Appellate Procedure, we have replaced the respondent party's name with Warden Marvin Plumley. The initial respondent on appeal, Adrian Hoke, is no longer the warden at Huttonsville Correctional Center.

concurrently for a total of ten to twenty years in prison. Petitioner's appeal of his convictions was refused by this Court in July of 2003. Petitioner thereafter filed a petition for writ of habeas corpus in circuit court. Following an omnibus evidentiary hearing and a review of the record of the underlying proceedings, the habeas court refused petitioner's petition for relief. Petitioner appeals.

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

"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." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009).

Nearly all of petitioner's assignments of error on appeal were issues raised in, and addressed by, the habeas court. On appeal, petitioner argues (1) that he received ineffective assistance of counsel; (2) that he was denied his right to a speedy trial; (3) that his mental competency, or lack thereof, compromised his ability to assist counsel; (4) exculpatory evidence regarding the alleged victim's recantation was impermissibly withheld from him; (5) the State's impeachment using the victim's purported letter was admitted in error; (6) petitioner's bail was revoked without sufficient cause; (7) the trial court erred by allowing the State to present evidence under West Virginia Rule of Evidence 404(b); (8) the State misquoted the evidence in its closing; (9) there was insufficient evidence to support his convictions; (10) petitioner received a far more severe sentence than expected; (11) that the sentence was excessive; (12) venue was not established; (13) there is cumulative effect of all the errors; (14) the indictment was defective; (15) the trial court lacked jurisdiction; (16) the trial court engaged in improper sentencing and used an improper verdict form; (17) the indictment contained multiplicity of charges and lacked specificity, which also created double jeopardy; (18) the grand jury minutes were not provided; (19) petitioner's counsel did not file a bill of particulars; (20) there was prosecutorial misconduct; (21) there was suppression of helpful evidence by lack of statement from the victim; (22) the State knowingly used perjured testimony; (23) the composition of the grand jury was compromised; and (24) the State unjustly altered documents.

For the few among all of petitioner's arguments that were not discussed in the circuit court order, we conduct our review with the following in mind: "This 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. 3, *Barnett v. Norfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

Accordingly, our review of the appellate record included a review for petitioner's arguments pertaining to the verdict form and the trial court's permission to allow the State to present evidence under West Virginia Rule of Evidence 404(b). Respondent contends that the circuit court did not abuse its discretion or commit any errors in these respects. Based on our review of the record, we find no abuse of discretion by the habeas court's refusal to grant petitioner habeas corpus relief. Further, we find the habeas court did not fail in laying out findings and conclusions in its order pursuant to West Virginia code § 53-4A-7, nor was there a cumulative effect of error. Having reviewed the circuit court's "Opinion Order Refusing Petition for Writ of Habeas Corpus Ad Subjiciendum" entered on August 5, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm the circuit court's decision denying habeas corpus relief.

Affirmed.

ISSUED: October 22, 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 MORGAN COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.

BENNY K
Petitioner,

v.

WILLIAM S. HAINES, Warden,
Huttonsville Correctional Center,
Respondent.

Case No. 05-P-2,
08-P-46

(Underlying Case No. 02-F-37)

**OPINION ORDER REFUSING PETITION FOR
WRIT OF HABEAS CORPUS AD SUBJICIENDUM**

This matter came on for the Court's consideration this _____ day of _____, 2011, upon the Amended Petition of Writ of Habeas Corpus Ad Subjiciendum, filed by Petitioner's counsel Nicholas F. Colvin, Esquire, on October 7, 2010, upon the evidence adduced at the Evidentiary Hearing held on January 13, 2011, at which appeared the Petitioner, Benny K , and his counsel Nicholas Colvin, Esq., the Prosecuting Attorney's Office of the County of Morgan, State of West Virginia by Debra MH McLaughlin, and upon hearing the testimony of Timothy Stapleton, Benny K Tom Stanley, Esq., and William Hayes, at the evidentiary hearing and the Court Record in Circuit Court Case No. 02-F-37.

Petitioner was indicted on the 3rd day of September, 2002, on 3 counts of Sexual abuse by a custodian (WV Code §61-8D-5), 3 counts of incest (WV Code §61-8-12(b)), and 3 counts of sexual assault, 3rd degree (WV Code §61-8B-5). After a jury trial held on the 8th and 9th days of April, 2003, the Petitioner was found guilty of all counts of the indictment.

At the sentencing hearing on May 22, 2003 the Court denied the Petitioner's Motion for a new trial and denied the Petitioners motion for verdict of acquittal. Petitioner was sentenced to three sentences of not less than ten nor more than twenty years for three counts of sexual abuse by

a custodian; three sentences of not less than five nor more than fifteen years for three counts of incest; and three sentences of not less than one nor more than five years for three counts of sexual assault third degree. Each of these sentences were ordered to be served concurrent with each other for an effective sentence of not less than ten nor more than twenty years. On July 14, 2003, the WV Supreme Court refused the petition for appeal filed by defendant.

Petitioner brings this habeas corpus action seeking to reverse the conviction and sentencing Order entered by the Circuit Court of Morgan County, West Virginia affirming his conviction and award the Petitioner a new trial.

The Court has carefully reviewed the evidence adduced at the omnibus evidentiary hearing held January 13, 2011, as well as the parties' written memoranda, pertinent legal authorities and the entire record of this case (and the underlying case). As a result of these deliberations, for the reasons set forth in the following opinion, the Court has concluded that the Petitioner has failed to establish a basis for the relief requested in the Petition for a Writ of Habeas Corpus Ad Subjiciendum.

OPINION

This case is governed by the provisions of West Virginia Code Section 53-4A-1 et seq. The habeas corpus statute "contemplates the exercise of discretion by the court." *Perdue v. Coiner*, 194 S.E. 2d 657 (W.Va. 1979). The circuit court denying or granting relief in a habeas corpus proceeding must make specific findings of fact and conclusions of law relating to each contention raised by the petitioner. *State ex. rel. Watson v. Hill*, 488 S.E. 2d 476 (W.Va. 1997). To sustain his Petition, Petitioner must prove his claims by a preponderance of the evidence.

In the case of *Losh v. McKenzie*, 277 S.E. 2d 606 (W.Va. 1981), the Supreme Court of Appeals of West Virginia compiled a comprehensive list of grounds "which might be considered

sufficient” for habeas relief. The Petitioner was directed in the Order Filing Petition for Post Conviction Habeas Corpus Relief to check each ground in the list that he considers inapplicable to the conviction(s) challenged in the Petition. This checklist is attached to the Petition for Writ of Habeas Corpus Ad Subjiciendum. This Court finds that Petitioner has knowingly and intelligently waived all grounds for relief other than the grounds discussed in this Opinion Order.

At the hearing held on September 3, 2010, at which the Petitioner appeared utilizing the video conferencing system, after a brief colloquy in open court, the Petitioner affirmatively waived all grounds identified in the *Losh* List form as set forth by the West Virginia Supreme Court of Appeals not specifically raised in his Petition. The Court instructed the Petitioner to set forth the numbers of the grounds from the *Losh* List which he would waive. While the Defendant stated he would not waive certain grounds but that he was not raising them at this time, the Court advised the Defendant that such a position would be the same as a waiver. Accordingly, the Court finds that the Petitioner did waive the following grounds:

1. No. 4 on *Losh* List, Prejudicial pre-trial publicity.
2. No. 6 on *Losh* List, Involuntary Guilty Plea.
3. No. 10 on *Losh* List, Language barrier to understanding the proceedings.
4. No. 11 on *Losh* List, Denial of counsel.
5. No. 12 on *Losh* List, Unintelligent waiver of counsel.
6. No. 15 on *Losh* List, Coerced confessions.
7. No. 19 of *Losh* List, Unfulfilled plea bargains.
8. No. 23 of *Losh* List, Irregularities in arrest.
9. No. 26 of *Losh* List, Illegal detention prior to arraignment.
10. No. 32 of *Losh* List, Pre-indictment delay
11. No. 33 of *Losh* List, Refusal of Continuance.
12. No. 35 of *Losh* List, Prejudicial Joinder of defendants.
13. No. 39 of *Losh* List, Claim of incompetence at time of offense as opposed to time of trial.
14. No. 40 of *Losh* List, Claims concerning use of informers to convict.
15. No. 46 of *Losh* List, Acquittal of co-defendant on same charges
16. No. 47 of *Losh* List, Defendant's absence from part of the proceedings.
17. No. 49 of *Losh* List, Question of actual guilt upon an acceptable guilty plea.
18. No. 53 of *Losh* List, Amount of time served on sentence and/or credit for time served.

Ground I and II

Trial Court Lacked Jurisdiction

Statute under which conviction obtained is unconstitutional.

The Petitioner offered no evidence in support of his claim in regards to either of these matters. A review of the record in the underlying case does not support any finding or irregularity on either of these issues.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of trial court lacking jurisdiction or the constitutionality of the statute under which the conviction was obtained.

Grounds I and II were decided under both State and Federal law.

Ground III and IV

Indictment shows on its face that no offense was committed.

Defects in indictment

The Petitioner argues that the indictment was defective in that it failed to allege the nature of the sexual contact being alleged. A review of the indictment shows that the indictment clearly includes all elements of the offenses charged.

The law is clear, "An indictment is sufficient under Article III, §14 of the West Virginia Constitution and W. Va. R. Crim. P. 7(c)(1) if it: (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy" Syl. Pt. 6, *State v. Wallace*, 517 S.E.2d 20, 205 W.Va. 155 (1999).

Accordingly, the indictment is a sufficient charging document that meets both State and Federal constitutional requirements as they relate to noticing the accused of the charges against

him. Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground that the indictment was on its face deficient or in claiming defects in the indictment.

Grounds III and IV were decided under both State and Federal law.

Ground V

Denial of Right to Speedy Trial

The Petitioner was arraigned on September 26, 2002 and was released on a \$5,000 cash or surety bond. The record shows that during arraignment, the Petitioner applied for court appointed counsel, which request was granted. Additionally, the Defendant was never charged in magistrate court but was first charged by way of a direct indictment to the Grand Jury on September 3, 2002. The Defendant waived his right to a speedy trial during arraignment. In that the Defendant was not incarcerated, there was no right to a trial within the term of court.

The Sixth Amendment speedy trial right begins with the actual arrest of the defendant and will also be initiated where there has been no arrest, but formal charges have been brought by way of an indictment or information.

Syl. Pt. 1, *State v. Drachman*, 358 S.E.2d 603, 178 W.Va. 207 (1987).

A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial.

Syl. Pt. 2, *State v. Foddrell*, 297 S.E.2d 829, 171 W.Va. 54 (1982). In the instant case, the Defendant was brought to trial within three terms of court,

Pursuant to W.Va. Code § 62-3-21 (1959), when an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three regular terms of court pass without

trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the statute.

Syl., *State v. Carter*, 513 S.E.2d 718, 204 W.Va. 491 (1998).

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground that he was denied a right to speedy trial.

Ground IV was decided under both State and Federal law.

Ground VI through VIII

Mental Competency at time of Trial

Mental Competency at the time of trial cognizable even if not asserted at proper time or if resolution not adequate

Incapacity to stand trial due to drug use

The Petitioner argues that due to his addiction to alcohol and marijuana he was not competent at the time of trial and was unable to properly assist his attorney in his own defense. The Petitioner testified at the evidentiary hearing that he was incarcerated at the time of trial and had been incarcerated since early January, 2003. The Petitioner testified that he was not using alcohol or drugs while incarcerated. Nevertheless Mr. K claimed that he was not able to assist his attorney fully due to having a cloudy mind in the months following his detox at the Eastern Regional Jail. The Petitioner offered no evidence on the issue of competency. This Court notes that the Court conducted a pretrial on January 17, 2003 at which time Mr. K testified. At the time of the pretrial, Mr. K was incarcerated. Mr. K was able to recall that he had been arrested on a "Saturday night last week" (Transcript for January 17, 2003, p. 42, ln. 14). Mr. K recalled where he was at the time of his arrest, and details about conditions of his release and events in family court which led Mr. K to believe he should be permitted around his daughter. (Transcript for January 17, 2003, p. 42-52). In addition the Court heard the testimony of Tom

Stanley, counsel for the Petitioner at the time of trial who testified he had no reason to question the Defendant's competency to stand trial. The Court also notes that the Defendant testified he was employed as a contractor and was working in that field at the time of the indictment.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground that he was incompetent at the time of trial.

Grounds VI through VIII were decided under both State and Federal law.

Ground IX

Failure of counsel to take appeal

The Petitioner argued that his appeal was denied because his attorney filed the appeal from the Circuit Court of Berkeley County and not Morgan County. A review of the record in the underlying case shows that while the Docketing Statement filed with the appeal states Berkeley County, the Statement of Facts clearly states the case was heard in Morgan County. Furthermore, the clerk's notes and docketing sheets clearly show that the Morgan County file was sent to the Supreme Court for its review for purposes of the appeal. The record in Morgan County Circuit Court Case No. 02-F-37 shows the appeal was filed and was refused by the Supreme Court.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of failure of counsel to take appeal.

Ground IX was decided under both State and Federal law.

Ground X

Consecutive sentences for same transaction

The Petitioner offered no evidence in support of his claim in regards to this matter. A review of the record in the underlying case does not support any finding or irregularity on this issue as the Petitioner received concurrent sentences.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of consecutive sentences for the same transaction.

Ground X was decided under both State and Federal law.

Ground XI

Suppression of helpful evidence by prosecutor

The Petitioner argues that the State failed to provide the Defendant with “the exact details” of the victim’s recantation of her allegations. However, during Tom Stanley’s testimony at the evidentiary hearing, Mr. Stanley, counsel for defendant, advised the court that he had talked to the victim on numerous occasions within his office and was well aware that the victim was denying any sexual abuse.

In addition, the Petitioner claims that the State did not properly preserve the ERJ phone conversations between the victim and the Defendant because they were difficult to hear. The petitioner claims there was malfeasance as it pertains to these tape recorded phone conversations.

The Court file reflects that the State provided the Defendant with notice of the recording on or about March 21, 2003. There is no evidence that the State tampered or altered the recordings.

Ground XII

State’s knowing use of perjured testimony

Petitioner alleges that the State elicited perjured testimony from the victim by asking her questions about the original allegations, knowing that the victim had prior to trial recanted those allegations. The trial record clearly shows that there was corroborating evidence to support the victim’s original allegations. The trial court correctly ruled that the victim’s credibility was a jury question. Petitioner’s argument that the juvenile victim should have had a parent present during her original interview with the police is not support by the law as she was a victim and not a

suspect.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of “State’s knowing use of perjured testimony”.

Ground XII was decided under both State and Federal law.

Ground XIII

Falsification of a transcript by Prosecutor

The Petitioner offered no evidence in support of his claim in regards to this matter. A review of the record in the underlying case does not support any finding or irregularity on this issue.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of falsification of a transcript by Prosecutor.

Ground XIII was decided under both State and Federal law.

Ground XIV

Information in presentence report erroneous

The Petitioner argued that the information in the PSI was erroneous in that it listed him as a co-owner of B&B Construction. The Petitioner argued this fact as having some significance as the owner of B&B Construction had been indicted for forgery and uttering in April of 2003. A review of the transcript from the May 22, 2003 sentencing hearing shows that this error was brought to the attention of the court. *See* Transcript May 22, 2003, p. 11 Ln. 13-17.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground that the information in the presentence report being erroneous.

Ground XIV was decided under both State and Federal law.

Ground XV and XVI

Ineffective assistance of counsel

Refusal to subpoena witnesses

Petitioner bases the claim of ineffective assistance of counsel upon the following alleged failures of defense counsel: (1) Lack of communication and failure of counsel to follow-up on motion to withdraw, (2) Inability of proper defense due to financial constraints of the Public Defender's office to provide him with the necessary experts both at trial (lack of handwriting expert) and at sentencing (lack of psychological evaluation for court to consider probation), (3) No defense witnesses, character or otherwise, called on the Defendant's behalf at trial, 4) Lack of DNA evidence and lack of medical testing of victim and Petitioner, 5) Counsel did not file motion for independent psychological evaluation of the alleged victim despite ample evidence that said motion was appropriate, 6) Poor medical health of counsel rendered assistance ineffective, 7) Failure to address his appellate concerns in a timely fashion and failed to file a Rule 35b) motion for reconsideration of sentence, 8) Improper voir dire, 9) Trial counsel failed to object to the defective indictment nor did trial counsel request a bill of particulars to clarify the indictment.

This Court reviews claims of ineffective assistance of counsel under the following two-part test 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 result of the proceedings would have been different.

Strickland v. Washington, 466 U.S. 668 (1984); *State v. Miller*, 459 S.E.2d 114 (W.Va. 1995). In *Miller* the Supreme Court of Appeals stated further,

In reviewing counsel's performance, courts 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.

Syl. Pt. 6, *State v. Miller*, 459 S.E.2d 114 (W.Va. 1995).

During the evidentiary hearing, the Petitioner called Tom Stanley, trial counsel as a witness. Tom Stanley testified that he had frequent contact with the Petitioner in preparation for trial and in addition, Mike McLaughlin, a private investigator met frequently with the Petitioner at Mr. Stanley's direction in preparation for the trial. In addition to meeting with the Petitioner, the Defense had frequent contacts with the victim in this matter in preparation for trial. Mr. Stanley testified that there were no financial constraints within the office of the public defender that prevented him from hiring an expert should he have felt an expert was needed. Mr. Stanley explained that the lack of psychological evaluation for the purpose of the sentencing hearing was based on his knowledge that as long as the defendant was denying the allegations surrounding the sexual assault, there would be no option for probation as no treatment plan could be created without the Defendant accepting responsibility for his actions. In response to questions regarding the lack of defense witnesses, Mr. Stanley explained that as trial counsel, he did not believe it to be in the Defendant's interest to make character an issue at trial. Mr. Stanley explained that his private investigator talked to all possible witnesses and based on the witnesses' recantation of allegations and the defendant's denial, he did not believe the witnesses would be helpful or necessary to the defense. Regarding DNA testing, the Petitioner offered no evidence to support his claim that the victim suffered from any communicable disease at the time of the allegations. Mr. Stanley recalled having reviewed medical records but had no independent recollection of there being the type of evidence claimed by Petitioner. Regarding lack of psychological testing of the victim, Mr. Stanley explained there was no reason to request psychological testing. The victim

had spoken to him on at least 6 occasions and was denying that she ever had sexual intercourse with the Petitioner. Regarding counsel's medical health, Mr. Stanley explained what medical problems he had at the time of the underlying court proceeding and testified at the evidentiary hearing, unequivocally, that nothing regarding his health problems interfered with his ability to try this case. Regarding the lack of a Rule 35 Motion, the Petitioner argues only that one was not filed. In that the Defendant received the minimum sentence allowed under the law, there would have been no reason to file a Rule 35 Motion. Regarding the voir dire process, this court has reviewed the transcript of the voir dire and finds nothing improper about the questions asked. Regarding the Petitioner's claim that the indictment was defective and defense counsel should have objected, the Court reiterates its previous finding that the indictment in this case was sufficient under the laws of this state and federal law.

The Court finds that not one of the identified acts or omissions alleged to have been committed by counsel fall outside the range of professionally competent conduct. The Court also concludes that Petitioner has failed to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Accordingly the Court concludes that Petitioner has failed to establish a right to relief on the ground of ineffective assistance of counsel or failure to subpoena witnesses for Defendant's case.

Grounds XV and XVI were presented and decided under state and federal law.

Ground XVII

Double Jeopardy

The Petitioner offered no evidence in support of his claim in regards to a claim of double jeopardy in this matter. A review of the record in the underlying case does not support any finding or irregularity on this issue.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of double jeopardy.

Ground XVII was decided under both State and Federal law.

Ground XVIII

Excessiveness or denial of bail

The Petitioner argues that his right to bail was revoked without sufficient cause. A review of the record in the underlying case does not support any finding or irregularity on this issue.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of double jeopardy.

Ground XVIII was decided under both State and Federal law.

Ground XIX

No preliminary hearing

The Petitioner offered no evidence in support of his claim in regards to this matter. A review of the record in the underlying case does not support any finding or irregularity on this issues.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of no preliminary hearing.

Ground XIX was decided under both State and Federal law.

Ground XX

Irregularities or errors in arraignment

The Petitioner offered no evidence in support of his claim in regards to either of these matters. A review of the record in the underlying case does not support any finding or irregularity on either of these issues.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of irregularities in the arraignment.

Ground XX was decided under both State and Federal law.

Ground XXI and XXII

Challenges to the composition of grand jury or its procedures

Non-disclosure of grand jury minutes

The Petitioner claims that he was improperly denied access to the grand jury minutes. Based on the denial of access to the minutes, he claims that the jury was not informed of the victim's recantation. During the evidentiary hearing, Mr. Stanley testified that the victim and her mother had advised him that, prior to the indictment, they had informed the State that they did not want the matter prosecuted. The Petitioner offered no evidence as to when the victim first recanted the allegations, nor does the Petitioner cite any authority for the proposition that the State would be obligated to inform the Grand Jury that the victim had recanted. The Petitioner offered no evidence to suggest the composition of the grand jury was improper.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of composition of the grand jury or its procedures and nondisclosure of grand jury minutes.

Grounds XXI and XXII were decided under both State and Federal law.

Ground XXIII

Failure to provide copy of indictment to defendant

The Petitioner offered no evidence in support of his claim that he was not provided a copy of the indictment. A review of the record in the underlying case does not support any finding or irregularity on this issue. In fact, Mr. Stanley testified at the evidentiary hearing that he explained

to the Defendant all charges contained in the indictment and the possible penalties under each.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of never having received a copy of the indictment.

Ground XXIII was decided under both State and Federal law.

Ground XXIV

Improper Venue

Petitioner argues that the State failed to establish venue for the offense. Petitioner correctly notes that venue need only be proved by a preponderance of the evidence. There was testimony from the mother, M. K. who stated that the sexual intercourse between the Defendant and her daughter was occurring within her home. (Transcript for April 8, 2003, pp. 158-63). Based upon the testimony of L. C., M. K., the letter written from L. to the Defendant, and the Statements of the Defendant, venue was clearly proven by the minimal preponderance of the evidence standard.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of venue not proven.

Ground XXIV was decided under both State and Federal law.

Ground XXV through XXIX

Lack of full public hearing

Refusal to turn over witness notes after witness has testified

Constitutional errors in evidentiary rulings

Instructions to Jury

Claims of prejudicial statements by trial judges

The Petitioner offered no evidence in support of his claim in regards to any of these

matters. A review of the record in the underlying case does not support any finding or irregularity on any of these issues.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on Grounds XXV through XXIX.

Grounds XXV through XXIX were decided under both State and Federal law.

Ground XXX

Claims of prejudicial statements by prosecutor

The Petitioner argues that the State intentionally misstated the evidence during closing argument when she stated, "He says there was one incident when he woke up with L in her own bed." (Transcript for April 9, 2003, p. 46). Counsel for the Defendant objected and noted for the jury that the Defendant never stated that L was with him but rather that he had woken in L bed. Following that objection, the transcript reflects that the Prosecutor read directly from the statement. While the Court notes that the Statement does not state that L was with the Defendant when he woke in her bed, the Court believes that a party would be justified in arguing that her presence was implied from the context of the complete statement which was admitted into evidence and available to the jury.

Petitioner questions the Prosecutor's closing argument contained in the transcript at pages 50 and 51. To understand the context of the quoted section, the entire paragraph must be read. The prosecutor is clearly referring to the elements of the offense as instructed by the court. (Transcript for April 9, 2003, p. 50, ln. 19). A review of the instructions reflects that the elements of the offense are numbered:

- 1) the Defendant, Benny K.
- 2) in Morgan County, West Virginia

- 3) on or between the blank day of March of 2002 and a blank day of April 2002
- 4) did engage in sexual contact with L. C. , a child
- 5) that Defendant, Benny K. , was then the custodian of said child
- 6) which child was under his care, custody or control

Clearly the Prosecutor is not blending information about the King residence and locations of the bedrooms of the victim and the Petitioner with an allegation of Guilt, but rather explaining how the residence is connected to the second element of venue which the State must prove.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of prosecutorial misconduct or prejudicial statements by prosecutor. This Court finds that the Prosecutor did no more than argue the facts as they related to the elements that the State was required to prove for a finding of guilt.

Ground XXX was decided under both State and Federal law.

Ground XXXI

Sufficiency of the evidence

Petitioner argues there was insufficient evidence on which to base a conviction. This same motion was made by counsel for the Defendant on a motion for directed verdict. The Court noted that the State presented circumstantial evidence to corroborate the victim's initial report to the police that she had sex with her father. It was up to the jury to determine whether the Statements made in the letter to her father and statements to the police alleging she was having sex with her father should be believed or whether the jury believed her current testimony that she had lied about having sex with her father. A review of the evidence presented shows there was sufficient evidence to support a conviction. The law is clear:

A criminal defendant challenging the sufficiency of the evidence to

support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, 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 guilt beyond a reasonable doubt. . . ."

Syl. Pt. 3, in part, *State v. Guthrie*, 461 S.E.2d 163, 194 W. Va. 657 (1995).

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of trial court sufficiency of the evidence.

Ground XXXI was decided under both State and Federal law.

Ground XXXII

Improper communications between prosecutor or witnesses and jury

The Petitioner offered no evidence in support of his claim in regards to improper communications between prosecutor or witnesses and jury. A review of the record in the underlying case does not support any finding or irregularity on either of these issues.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of improper communications between prosecutor or witnesses and jury.

Ground XXXII was decided under both State and Federal law.

Ground XXXIII and XXXIV

Severer sentence than expected

Excessive Sentence

The Petitioner argues he received a severer sentence than expected and/or excessive sentence. The Court notes that the Defendant received the minimum sentence permitted under the

law. Tom Stanley testified at the evidentiary hearing that he explained the potential sentence to the Defendant prior to trial. While Mr. Stanley acknowledged he did not obtain a psychological/psychiatric evaluation for the purpose of requesting probation, he explained that based upon the Defendant's denial of any and all allegations, he could not have been eligible for probation as there could not have been a treatment plan without any admission that some form of sexual abuse had occurred. The record supports Mr. Stanley's testimony, in that at sentencing, counsel for the Defendant did in fact request time to obtain a psychiatric/psychological evaluation, should the court believe he was a possible candidate for probation.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of severer sentence than expected or excessive sentence.

Grounds XXXIII and XXXIV were decided under both State and Federal law.

Ground XXXV

Mistaken advice of counsel as to parole or probation eligibility

The Petitioner offered no evidence in support of his claim in regards to mistaken advice of counsel as to parole or probation eligibility. A review of the record in the underlying case and the testimonies of both the Petitioner and Tom Stanley during the evidentiary hearing do not support any finding or irregularity on this issue.

Accordingly, the Court concludes that Petitioner has failed to establish a right to relief on the ground of mistaken advice of counsel as to parole or probation eligibility.

Ground XXXV was decided under both State and Federal law.

In response to any and all of the additional grounds raised by the Petitioner in his Petition, the Court finds no Constitutional violations raised to support habeas relief.

RULING

It is accordingly **ADJUDGED** and **ORDERED** that the Writ of Habeas Corpus Ad Subjiciendum be and hereby is **REFUSED**.

The Petition for a Writ of Habeas Corpus Ad Subjiciendum is **DISMISSED**.

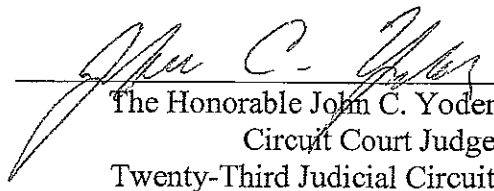
In the event that the Petitioner may desire to appeal this **ORDER** to the State of West Virginia Supreme Court of Appeals, it is **ORDERED** that Nicholas Colvin, Esq. be and is hereby appointed to present and prosecute such an appeal.

In as much as this Order represents a **FINAL ORDER** after an Omnibus Hearing and is dispositive of all state level habeas issues, it is **ORDERED** that the Clerk of the West Virginia Supreme Court of Appeals file this Order in that Court's master omnibus habeas corpus file.

The Court notes the timely exception of all parties to any and all adverse rulings herein contained.

This is a Final Order. The Clerk is directed to close this case, to retire it from the active docket of the Court, and to place it among causes ended.

The Clerk shall enter this Order as and for the day and date first above written and shall transmit attested copies to all counsel of record.


The Honorable John C. Yoder
Circuit Court Judge
Twenty-Third Judicial Circuit

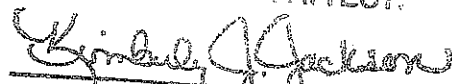
Prepared by:

Debra MH McLaughlin
Office of the Prosecuting Attorney

CC: 8-9-11
PA
Colvin

GUARDIAN ☐ MAG ☐ 20
DOM ☐ MH ☐
CIVIL ☒ JUVENILE ☐
CRIMINAL ☐ ADM ☐
ORDER BOOK 3
PAGE 263 INITIAL
DATE _____

A TRUE COPY. ATTEST:


Clerk of the Circuit Court
of Morgan County, West Virginia
By Helen H. M... 