STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State *ex rel*. Bobby Stotler,
Petitioner Below, Petitioner

vs) No. 11-1282 (Berkeley County 05-C-937)

David Ballard, Warden,
Respondent Below, Respondent

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

MEMORANDUM DECISION

Petitioner Bobby Stotler, by counsel, Christopher Prezioso, appeals the Circuit Court of Berkeley County's order entered on August 10, 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 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 fleeing from an officer in an automobile while under the influence of alcohol. A recidivist information was filed against petitioner, alleging a prior felony, and later a second recidivist information was filed, alleging two prior felonies and recommending a sentence of life in prison pursuant to the recidivist statute. A jury found that petitioner in fact was a recidivist offender, and petitioner was then sentenced to life in prison. He filed a direct appeal to this Court, which was refused. Petitioner then filed a petition for writ of habeas corpus, and the circuit court denied habeas relief without a hearing. 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 order shows that the circuit court properly determined that petitioner was not entitled to relief without the necessity of a hearing.

Petitioner next argues that his rights were violated when a statement was admitted at trial that was taken in violation of the prompt presentment rule. Petitioner argues that he was arrested at 5:37 a.m., given an intoxilizer test at 7:26 a.m., given a Miranda warning at 7:40 a.m., but was not taken to Eastern Regional Jail until 4:30 p.m. He was refused access at the jail due to his injuries, and was therefore taken to City Hospital. After treatment, he was presented before a magistrate at 10:30 p.m. Petitioner argues that there was "no good reason" for the officers' failure to promptly present petitioner to a magistrate, and asserts that he was kept hidden to hide the injuries inflicted upon him by police officers.

In response, the State argues that this issue was raised on petitioner's direct appeal, which was refused by this Court. Moreover, the evidence shows that the statements complained of were made within the first two hours of his arrest, before charging documents were complete, and before a magistrate would have been on duty.

This Court has found as follows:

> " ' "Ordinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule." Syllabus Point 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).' Syllabus Point 8, *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706, cert. denied, 488 U.S. 895, 109 S.Ct. 236, 102 L.Ed.2d 226 (1988)." Syllabus

Point 2, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. Pt. 14, *State v. Newcomb*, 223 W.Va. 843, 679 S.E.2d 675 (2009). Upon a review of the record and the arguments herein, this Court finds that the circuit court was not clearly wrong in denying habeas relief regarding the alleged failure to promptly present petitioner to a magistrate.

Petitioner also argues many of the issues he asserted before the circuit court in his petition for writ of habeas corpus. These include: ineffective assistance of counsel; improper life sentence in violation of the state and federal Constitutions; and, perjured and false testimony. Petitioner also alleged the following assignments of error, but failed to offer any arguments in support of the same: failure to suppress and exclude certain evidence; insufficient evidence to sustain a conviction; and petitioner's alleged incompetence to stand trial. The State has responded to each allegation, arguing in favor of the circuit court's findings.

Petitioner gives no more than a blanket statement of error with no argument of support regarding the failure to suppress and exclude certain evidence; insufficient evidence to sustain a conviction; and petitioner's alleged incompetence to stand trial. Therefore, pursuant to Rule 10(c)(4) of the Revised Rules of Appellate Procedure, this Court disregards these assignments of error for failure to comply with the requirements of this rule.

The Court has carefully considered the merits of each of petitioner's other 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 the circuit court's detailed and well-reasoned "Final Order Denying Petition for Writ of Habeas Corpus" dated August 10, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 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

C Prezioso

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

STATE OF WEST VIRGINIA ex rel.
BOBBY LEE STOTLER,

Petitioner,

v.

CIVIL CASE NO. 05-C-937
Underlying Criminal Action
Number: 03-F-36
JUDGE WILKES

DAVID BALLARD, Warden,

Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This matter came before the Court this 10 day of August 2011, pursuant to Petitioner's Amended Petition for Writ of Habeas Corpus And Request for Evidentiary Hearing and Lost List. Upon the appearance of Petitioner, Bobby Lee Stotler, by counsel Christopher Prezioso, and Respondent, David Ballard, by counsel Christopher Quasebarth.

FINDINGS OF FACT

1. On February 20, 2003 Petitioner an Indictment was issued by a West Virginia Grand Jury charging Stotler with one count Fleeing From an Officer While Under the Influence, under W. Va. Code § 61-5-17(i), and one count Kidnapping, under W. Va. Code § 61-2-14a.

2. The charges stemmed from an incident on January 12, 2002, where Petitioner was alleged to have fled from the police creating the need for a police chase.

3. Prior to trial the State of West Virginia decided not to pursue a conviction on the second count of the Indictment, being Kidnapping.

4. On April 15, 2003, a jury trial was held on count one of the Indictment, Fleeing From an Officer While Under the Influence, and Petition was found guilty by the jury of that charge.

5. Petitioner filed a Motion for New Trial on April 25, 2003, alleging trial court error in failing to suppress the Petitioner's statements, allowing the admittance of Intoxilyzer results, and that the verdict was unsupported by law and evidence.

6. The State filed a Recidivist Information on April 25, 2003, seeking enhancement for a single prior felony, but then an Amended Recidivist Information was filed on May 15, 2003, alleging that Petitioner was a habitual offender and eligible for a mandatory life sentence.

7. On July 2, 2003 a jury trial was held on the Recidivist Information, wherein Petitioner was found guilty of twice before being convicted of a felony.

8. After the July 2, 2003 trial, Petitioner filed a Motion for New Trial from Recidivist Proceeding, arguing that there was improper jury selection, selective prosecution, and a disproportionate sentencing.

9. On September 22, 2003, a sentencing hearing was held and Petitioner, Bobby Lee Stotler, received the mandatory life sentence following his Recidivist Conviction.

10. Petitioner filed a Notice of Intent to Appeal on October 27, 2003, and the direct appeal was denied by the West Virginia Supreme Court of Appeals on September 2, 2004.

CONCLUSIONS OF LAW

This matter comes before the Court upon Petitioner's Petition for Writ of Habeas Corpus. This Court has previously appointed counsel, who filed an amended petition, and subsequent to an initial review the Court has ordered the respondent to file an answer. At this point in the

proceedings the Court is to review the relevant filings, affidavits, exhibits, records and other documentary evidence attached to the petition to determine if any of petitioner's claims have merit and demand an evidentiary hearing to determine if the writ should be granted. Otherwise the Court must issue a final order denying the petition.

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).

When reviewing the merits of a petitioner's contention the Court recognizes that "there is a strong presumption in favor of the regularity of court proceedings and the burden is on the person who alleges irregularity to show affirmatively that such irregularity existed." *Syl. Pt. 2, State ex rel. Scott v. Boles*, 150 W. Va. 453 (1966). Furthermore, specificity is required in habeas pleadings, thus a mere recitation of a ground for relief without detailed factual support will not justify the issuance of a writ or the holding of a hearing. W. Va. Code § 53-4A-2; *Losh v. McKenzie,* 166 W. Va. 762, 771 (1981). "When a circuit court, in its discretion, chooses to dismiss a habeas corpus allegation because the petition does not provide adequate facts to allow the circuit court to make a 'fair adjudication of the matter,' the dismissal is without prejudice." *Markley v. Coleman,* 215 W. Va. 729, 734 (2004), *see* R. Hab. Corp. 4(c). However, rather than dismissing without prejudice the court may "summarily deny unsupported claims that are randomly selected from the list of grounds," laid out in *Losh v. McKenzie*. *Losh v. McKenzie,* 166 W. Va. 762, 771 (1981); *Markley v. Coleman*, 215 W. Va. 729, 733 (2004).

In addition to a review on the merits, the Court must determine if the contentions raised by the petitioner have been previously and finally adjudicated or waived. "West Virginia Code § 53-4A-1(b) (1981) states that an issue is 'previously and finally adjudicated' when, at some point, there has been 'a decision on the merits thereof after a full and fair hearing thereon' with the right to appeal such decision having been exhausted or waived, 'unless said decision upon the merits is clearly wrong.'" *Smith v. Hedrick*, 181 W. Va. 394, 395 (1989). But, a "rejection of a petition for appeal is not a decision on the merits precluding all future consideration on the issues raised therein . . ." *Syl. Pt. 1, Smith v. Hedrick*, 181 W. Va. 394 (1989). However, "there is a

rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance." *Syl. Pt. 1, Ford v. Coiner*, 156 W. Va. 362 (1972). In addition, any grounds not raised in the petition for habeas corpus are deemed waived. *Losh v. McKenzie*, 166 W. Va. 762 (1981).

The Court, after reviewing the petition, answer, affidavits, exhibits, and all other relevant documentary evidence, finds that Petitioner is not entitled to the relief requested of a Writ of Habeas Corpus. The Court lays out its reasoning below for denying Petitioner's claims and also describes how an evidentiary hearing is not necessary before denying all of the claims in Petitioner's Amended Petition for Writ of Habeas Corpus.

I. Ineffective Assistance of Counsel

Petitioner here raises the contention of ineffective assistance of counsel pertaining to his trial and appellate counsel's performance. Both the Sixth Amendment to the Constitution of the United States and Article III, §14 of the Constitution of West Virginia assure not only the assistance of counsel in a criminal proceeding but that a defendant should receive "competent and effective assistance of counsel." *State ex rel. Strogen v. Trent*, 196 W. Va. 148, 152 (1996). In order to evaluate whether a defendant has received competent and effective assistance from their counsel West Virginia has adopted the two pronged test established by the United State Supreme Court in *Strickland v. Washington*. In order to prevail on a claim of ineffective assistance of counsel a petitioner under the two-prong test must show: "(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." *Syl. Pt. 5, State v. Miller*, 194 W. Va. 3 (1995) (referencing *Strickland v. Washington*, 466 U.S. 668 (1984)). "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. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." *Syl. Pt. 6, State v. Miller,* 194 W. Va. 3 (1995); *Syl. Pt. 2, State ex rel. Strogen v. Trent,* 196 W. Va. 148, 152 (1996). Under a consistent policy shown by the West Virginia Supreme Court of Appeals and the United States Supreme Court the analysis under ineffective assistance of counsel "must be highly deferential and prohibiting 'intensive scrutiny of counsel and rigid requirements for acceptable assistance.'" *State v. Miller*, 194 W. Va. 3, 16 (1995) (citing *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984)). One key area, or the "fulcrum," for this analysis is counsel's investigation of the case, therefore while judicial scrutiny must be highly deferential, "counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients." *Syl. Pt. 3, State ex rel. Strogen v. Trent,* 196 W. Va. 148, 152 (1996).

Petitioner raises various claims as to ineffective assistance of counsel against both his trial counsel and appellate counsel. None of these claims meet the standard for ineffective assistance of counsel, nor does the overall effect of these claims lead to a valid claim for ineffective assistance of counsel. The first claim to be addressed involves Petitioner's knowledge of the effect of the habitual offender statute, W. Va. Code § 61-11-18, and Petitioner's claim that his trial counsel did not inform him of the effect of that statute. Petitioner

argues that if he knew the potential for a life sentence as a habitual offender he would have taken a plea. Furthermore, Petitioner argues that the State offered a plea under which Petitioner would have only received a sentence enhancement as for a second felony, not a mandatory life sentence for a third felony. Petitioner argues that his trial counsel, Deborah Lawson, was ineffective for not properly researching Petitioner's past criminal history and informing him of the benefit of taking a plea. In this case, the initial discovery provided by the State only listed one prior felony conviction. It appears that defense counsel relied on this criminal history, but it is not clear whether counsel questioned her client to ensure that the criminal history was correct. But even if the Court were to find that defense counsel should have had a better knowledge of Petitioner's criminal history, making her performance deficient under an objective standard of reasonableness, Petitioner's claim would still fail under the second prong because the results would not have been different. Petitioner misconstrues the plea offer and negotiations by the State prior to trial. The relevant portion of the transcript, also cited by Petitioner, states as follows:

> "The Court: . . . Why don't you put on the record any plea that may have been offered so the defendant can't complain later?
>
> Ms. Lawson: There has been no plea offer.
>
> The Court: Plea to the indictment basically?
>
> Mr. Jones: yes. We have a prior conviction on the defendant. If we do get a conviction we're going to be seeking to enhance.
>
> Ms. Lawson: I think that's a hang-up. I think the defendant would be willing to pleas straight up and take the penitentiary sentence but they want to seek enhancement." Pre-trial Transcript, April 9, 2003, pp. 31-32.

Petitioner seems to surmise from this dialogue that he was offered a plea in which his enhancement to a doubling of the sentence due to a single prior felony. Petitioner misconstrues

the plea offered to him. The State only left the door open to Petitioner pleading guilty to the sole remaining count of the Indictment. There was no limitation on sentencing included as an additional incentive in a plea agreement. At that time the State believed that Petitioner had only one prior felony, therefore they had indicated to the Court and Defendant that in seeking enhancement they would be looking to seek twice the minimum eligibility. This implication was a result of a misunderstanding the by the State, and not a negotiated benefit of a plea agreement. If Petitioner had taken the plea, he would have only been admitting his guilt to the underlying crime. The State would have been free to file a recidivist information and then file and amended recidivist information after finding Petitioner's second prior felony, just as they did following his trial, and the result would not have been any different. In fact, defense counsel's actions in defending Petitioner at trial were more helpful to Petitioner, giving him at least a chance to challenge his third conviction; because the only plea he had available to him was to simply admit to his guilt as to the underlying charge.

Next Petitioner alleges that trial counsel did not properly investigate his case in order to form a proper defense. Petitioner alleges that trial counsel did not watch the video recording or the police chase, because Petitioner believes if she did she would have seen that his statements were wrongfully coerced and that he was beaten by a police officer. Also, Petitioner alleges that trial counsel did not properly investigate the defense of whether Michael Hess was driving the automobile. First, specificity is required in habeas pleadings and Petitioner provides no factual support for these allegations against his counsel. Furthermore, the pre-trial and trial transcripts show that trial counsel was well informed of both the evidence supporting an argument for suppression of statements, potential police violence, and the defense that Petitioner was not driving the car. At the pre-trial hearing the admissibility of Petitioner's statements was

vigorously argued by trial counsel, *see* Pre-trial Transcript, April 14, 2003. Also at trial, trial counsel questioned Trooper Harmon about him striking Petitioner with his fists and using pepper spray as Petitioner attempted to flee on foot, and Lawson cross-examined the treating physician about the cause of Petitioner's injuries when he was presented to him. Trial Transcript, April 15, 2003, pp. 87-90 & 129-131. It is clear from the record that Petitioner's trial counsel had a sufficient understanding of the facts of the case, which were derived from an investigation that was reasonable under an objective standard. Furthermore, Petitioner provides no specific factual support to call into question the clear implication form the transcripts in this matter.

Petitioner's third claim of ineffective assistance of counsel involves a plea offer made by the State prior to the recidivist hearing. On May 21, 2003, the State offered a plea to Petitioner to admit to his conviction on a single prior felony, and the State would not pursue a sentence enhancement on the second prior felony. Petitioner claims that his trial counsel did not properly explain the plea, which lead him to reject the plea and subjected him to a higher sentence enhancement. Petitioner does not provide any specific factual support for this allegation, and in fact the transcript directly contradicts Petitioner's claim. Before the Court, upon a Motion to Withdraw as Counsel, defense counsel states to the Court:

> "There was a subsequent plea offered made by the State prior to the recidivist hearing. It was made at a meeting at the jail between myself - - Sergeant Burnette, Mr. Stotler and myself. That plea was also refused.
>
> . . .
>
> In addition there were discussion between Mr. Stotler and myself between the wisdom of pleading straight up to the first recidivist, straight up as the Court recalls it was later amended." Sentencing Hearing Transcript, September 22, 2003, p. 3.

The transcript gives evidence of Lawson discussing the plea offer with Petitioner twice before the recidivist trial, and even evidence of a discussion of the merit of pleading straight up

to the first recidivist information, which would have only been on one prior felony conviction. The transcript shows that Lawson's actions were reasonable under an objective standard, and there is no specific factual support to uphold Petitioner's claim that she did not explain the plea offer.

In his fourth claim for ineffective assistance of counsel, Petitioner asserts that the video of his police chase should have been forensically analyzed in order to provide evidence of police brutality. Petitioner argues that forensic analysis would have enhanced the audio quality of the tape and provided additional evidence as to Petitioner being beaten. But, Petitioner did not have the tape forensically analyzed for this habeas and does not allege what exactly is hidden on the tape that can not be heard on the unenhanced version. Petitioner argues in his habeas that, "certain audio evidence can be heard which proves that Petitioner was severely beaten . . . this evidence was not explored or presented to the jury." Amended Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing, p. 9. The Court is perplexed by this allegation, because much evidence was presented on this issue and trial counsel clearly pursued this avenue. First, the entire police chase video was played to the jury, including the portions containing the audio Petitioner alleges is evidence of police brutality. Second, trial counsel cross-examined Trooper Harmon about potential police brutality. Third, Petitioner himself points to evidence from a treating physician and from cross-examination questions to the same physician about the cause of Petitioner's injuries. The evidence Petitioner claims is not presented is clearly shown in the transcript available to the Court, the jury simply chose to decide the facts in a manner contrary to Petitioner's recollection. Furthermore, Petitioner does not show or even specifically allege what additional audio evidence would be found if the audio was enhanced. Therefore, the Court finds no validity to this claim for ineffective assistance of counsel.

Next, the Petitioner submits the contention that his trial counsel's performance at trial was so deficient as to call for a finding of ineffective assistance of counsel. Petitioner makes a variety of complaints about the trial counsel's effectiveness at trial, but none of the claims rise to the level of ineffective assistance of counsel and therefore this contention has no merit. It is clear from the transcript of the trial that trial counsel's trial strategy and performance was reasonable, particularly understanding that the court should not engage in hindsight or second-guessing of counsel's strategic decisions. Furthermore, the Court finds that all claims as to failure to submit or draw out certain evidence are without merit, since the transcript clearly shows that trial counsel fully developed each of the potential defenses and there is no evidence that the Petitioner can specifically point to that is missing from this case.

In Petitioner's sixth claim for ineffective assistance of counsel, Petitioner complains that trial counsel did not seek any mental defense or test for diminished capacity. While making these claims Petitioner does not point to a single factor that would indicate a need to test for these defenses or to question Petitioner's capacity. Also, Petitioner has not provided any evidence that he lack mental capacity or was in a diminished mental state during the commission of the crime. Once again, Petitioner must provide specific factual support and can not seek relief on bald allegations. The Court sees no proof in the transcripts that would cause trial counsel to test for mental defenses or diminished capacity, and without any showing at all of the availability of such defenses by Petitioner, there is no reason to think that trial counsel's performance was deficient.

Once again under a claim for Failure to Communicate with Client, Petitioner argues that trial counsel failed to explain to him that he may receive a life sentence. Also, Petitioner alleges that no one came to talk to him about his plea or defenses prior to the pre-trial conference. First,

the Court has already addressed the issue of plea negotiations prior to trial and finds no evidence that trial counsel failed to perform her duties under an objective standard, but furthermore that there is clearly no prejudice in this case. As to any lack of communication by trial counsel prior to the pre-trial hearing, Petitioner provides no specific factual allegations. Furthermore, the transcript from April 9, 2003, April 14, 2003, and April 15, 2003; being the pre-trial and trial transcripts, show that trial counsel was fully aware of the issues involved in the trial and competent to explore all possible defenses. Lawson's knowledge of the case and ability to flesh out the possible defenses, as well as argue fully for suppression of certain statements, seems to contradict Petitioner's claims of failure to communicate, and at the very least shows that there was no prejudice.

Petitioner next claims ineffective assistance of counsel against his appellate counsel for failure to raise the issues of prosecutorial misconduct and improper classification as habitual offender in his direct appeal. First, the appeal does address Petitioner's life sentence under the habitual offender statute, therefore the issue was raised. The Court sees no alternate argument in this area to which Petitioner is referring which was not pursued on appeal. Second, Petitioner does not present any specific factual support or even make any specific allegations of prosecutorial misconduct that could have been challenged upon appeal. Specificity is required in habeas pleadings and there is no reason provided here that would make the Court question the appellate counsel's performance.

Under claim nine for ineffective assistance of counsel, Petitioner argues that trial counsel's failure to request change of venue amounts to ineffective assistance of counsel. Petitioner states that, "[a] simple review of Petitioner's current circumstances makes it clear that he could not receive a fair trial or sentencing in Berkeley County, West Virginia." Unfortunately

for Petitioner having an unfavorable result is not proof that the venue was improper. Petitioner points to no facts which would have disqualified the judge hearing his case, nor any unfair publicity of the case which would have tarnished the jury, or any other factors that made his trial in Berkeley County the improper venue. Petitioner makes a blanket allegation that he was misled by his attorney, the police and the Court, but the transcript does not show any false or misleading information provided to Petitioner and in fact directly contradicts such a claim.

Petitioner's tenth claim is that trial counsel failed to raise the issue of improper police misconduct. Petitioner recounts certain events from the night he was arrested, alleging various acts of police brutality. Petitioner argues that trial counsel failed to enter any evidence of the events that Petitioner recounts in his habeas petition. First, the choice to testify is solely a Defendants and Petitioner had the right to tell his story of the events concerning his capture and subsequent arrest. Considering the certain strategic decision involved with a defendant testifying this may not have been the best course to enter such evidence. So, without Petitioner's testimony the trial counsel was left with video and audio evidence, evidence of physical injuries, and attacking the testimony of Trooper Harmon. Other than Petitioner's testimony, which it is the sole decision of the defendant whether to take the stand; all other avenues of evidence showing police brutality were presented at trial. The trial counsel's performance was clearly reasonable under the circumstances, since counsel can't simply proffer evidence to the jury and can't force her client to testify. The Court today can not simply accept the recounting of the event found in Petitioner's habeas, the credibility of those statements are properly adjudged by a jury, and beyond Petitioner's own recounting the trial counsel submitted as much evidence as she could reasonably be expected extract.

Petitioner's next claim is that trial counsel improperly advised him to waive his rights to a preliminary hearing. Even if the Court accepted all of Petitioner's allegations as true, there is no showing of prejudice. Therefore, this claim clearly fails under the second prong of the test for ineffective assistance of counsel.

Next, Petitioner claims that three witnesses should have been subpoenaed by trial counsel. Petitioner argues that a guard at the Eastern Regional Jail, the public defender's investigator, and an employee at City Hospital should have been called as witnesses, all relating to injuries sustained by Petitioner the night of his arrest. The Court does not see how not calling these witnesses was unreasonable on the part of trial counsel under an objective standard, and further finds no prejudice. Evidence was submitted at trial of Petitioner's injuries, specifically form his treating physician who had the most complete understanding of those injuries. Whether other persons saw that he was injured wasn't necessary to show Petitioner's injuries. The real issue Petitioner wanted to raise as a defense was the cause of those injuries. That information was discoverable from the persons at the scene, Petitioner and Trooper Harmon, and possibly through the opinion of the treating physician. Both Trooper Harmon testified, and was cross-examined by trial counsel concerning possible police brutality, and the treating physician testified and was cross-examined. Petitioner had the right to testify, therefore the Court does not find where these witnesses were necessary and where the trial counsel's strategic decision not to call them was unreasonable under an objective standard.

Finally, Petitioner complains that trial counsel did not request the Grand Jury Minutes or Grand Jury Transcripts. Petitioner does not provide any factual support for his allegations as to prejudice caused by this action. Specificity is required in habeas pleadings and the mere recitation of a ground for relief without detailed factual support will not justify the issuance of a

writ or the holding of a hearing. W. Va. Code § 53-4A-2; *Losh v. McKenzie,* 166 W. Va. 762, 771 (1981).

Looking at all of the claims against the trail counsel and appellate counsel for ineffective assistance of counsel, the Court finds not merit in any of Petitioner's claims. Therefore, the Court also finds that there is no cumulative effect of counsels' error which has prejudiced Petitioner. In reviewing each of these claims the transcript is clear on each of the issues raised by Petitioner, therefore the Court finds no need for an evidentiary hearing because the Court can find that there is no merit to any of Petitioner's claim from the items already before the Court.

II. Improper Sentence

Petitioner argues that his life sentence is improper, and is in violation of the Eight Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution. Petitioner argues that he was convicted of fleeing from an officer in a vehicle while under the influence of alcohol, which carries a sentence of one (1) to five (5) years in state penitentiary; and to serve a life sentence on such a conviction is too harsh and grossly disproportionate. But Petitioner neglects to reflect that he was also convicted of being twice before convicted of a felony, and under W. Va. Code § 61-11-18, the statute calls for a life sentence in such a case. "Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review." *Syl. Pt. 6, State v. Woodson,* 222 W. Va. 607 (2008). There is no claim raised by Petitioner that the court considered any impermissible factors when issuing the sentence in this case. Furthermore, Petitioner's sentence is within the statutory limits. Therefore, there is no merit to the challenge

that this sentence is grossly disproportionate and no evidentiary hearing is needed since the law is clear on this point.

III. Sufficiency of Evidence

Petitioner here argues that the evidence presented at trial and during his recidivist hearing is insufficient for conviction. First, Petitioner did not raise this ground upon his direct appeal, and any ground that a habeas petitions could have raised on direct appeal, but did not, carries a rebuttable presumption that it is waived. *Syl. Pt. 1, Ford v. Coiner*, 156 W. Va. 362 (1972). Also, in Petitioner's claim for ineffective assistance of counsel against appellate counsel he did not allege that counsel's failure to raise this argument was a cause for ineffective assistance. The Court also found that appellate counsel was not ineffective. Therefore, it appears that Petitioner has waived this ground. Even if not waived Petitioner's claim does not have merit. Petitioner claims that at trial no credible evidence was offered that he was actually driving the car, and at the recidivist trial Petitioner claims that the State failed to prove beyond a reasonable doubt that he had twice before been convicted.

> "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 reducibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilty so long as the jury can find guilty 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 weighted, from which a jury could find guilty beyond a reasonable doubt." *Syl. Pt. 3, State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

At trial, the State presented Michael Williams Hess as a witness to testify that Petitioner was driving the vehicle in question. The jury is tasked with judging credibility, therefore the Court can not now question the credibility of this testimony, only find that it was presented and was sufficient for the jury to find against Petitioner on this point. Also, as to Petitioner's claim under the recidivist trial, the transcript from July 2, 2003 of the Recidivist trial shows various evidence, from court records, to testimony, and also finger prints, that identifies Petitioner as the person who was previously convicted of these two prior felonies. The record is clear on these issues and there is no need for an evidentiary hearing, the Petitioner's claims are without merit, and also have been previously waived.

IV. Admissibility of Statement

Petitioner argues that his late presentment to the magistrate judge is in violation of W. Va. Code § 62-1-5 and Rule 5(a) of the West Virginia Rules of Criminal Procedure, and therefore any statements taken by the police should be excluded. *See State v. Knotts*, 421 S.E.2d 917 (W. Va. 1992). In reviewing this matter the Court looks to a "clearly wrong" standard, since the issue was previously adjudicated by the trial court at the April 14, 2003 pre-trial hearing. *See* W. Va. Code § 53-4A-1(b). The trial court found that the statements in question were giving within the first two hours after his arrest, and that they were spontaneous statement that Petitioner was drunk and that the police should go easy on him. Pre-Trial Hearing Transcript, April 14, 2003. The trial court ruled that the prompt presentment rules had no applicability to the statements in question, and this Court finds no evidence that this decision was "clearly wrong." In fact, the Court finds that the facts of this case support the trial court's ruling. All

relevant evidence is available from the transcript of the pre-trial hearing, therefore an evidentiary hearing is not necessary to find that Petitioner's claim is without merit.

V. Jury Selection Process

Petitioner claims that between 1998 and 2004 the Berkeley County Circuit Clerk improperly selected prospective jurors in alphabetical order from the term's jury panel list. "A trial court's failure to remove a biased juror from a jury panel does not violate a defendant's right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice." *Syl. Pt. 7, State v. Phillips,* 194 W. Va. 569 (1995). Therefore, without a showing of prejudice this is not a constitutional issue and thus not appropriate for consideration under habeas. Petitioner provided no specific allegations of prejudice and points to no evidence that would bring such prejudice to light, therefore an evidentiary hearing is not necessary on this matter for this Court to find that Petitioner's claim is without merit.

Furthermore, the West Virginia Supreme Court's decision regarding this process does not apply to Petitioner. *State Ex Rel. Stanley v. Sine,* 594 S.E.2d 314 (2004). In *Sine*, the Court addressed this specific error (as a violation of statute) and noted that it was not to apply retroactively. *State Ex Rel. Stanley v. Sine,* 594 S.E.2d 314 at 321 (2004). The Petitioner's jury selection occurred prior to the *Sine* decision. So, by the language of the *Sine* decision, it does not apply to Petitioner.

VI. Perjured and False Testimony

Petitioner here claims that his due process rights were violated because the State offered false testimony against him from Michael Hess and from various police officers. First, Petitioner did not raise this ground upon his direct appeal, and any ground that a habeas petitions could have raised on direct appeal, but did not, carries a rebuttable presumption that it is waived. *Syl. Pt. 1, Ford v. Coiner*, 156 W. Va. 362 (1972). Even if Petitioner had not waived this ground for relief, Petitioner's claims have no merit.

First Petitioner alleges that the State knew Michael Hess was a liar and still offered his testimony. Originally Hess claimed that Petitioner held him against his will at knifepoint, and it was based on this information that Petitioner was originally charged with kidnapping. This charge was eventually dismissed by the State, Petitioner argues that this shows that Hess is not a reliable witness. Petitioner's argument fails in that the State did no present evidence at trial of kidnapping or where Petitioner was alleged to have held Hess against his will. Hess testified for the State that he voluntarily rode with Petitioner, Petitioner was driving the entire night, and that Petitioner arrived a "little wasted" and drank three or four more bottles while they were together. Trial Transcript, April 15, 2003, pp. 67-70. Petitioner points to no evidence that this portion of Hess's testimony was false testimony. The credibility of Hess as a witness was the province of the jury. In fact, Petitioner's trial counsel introduced Hess's statement alleging that Petitioner held him against his will during cross-examination. The jury heard about Hess's prior false statement to the police and determined that he remained credible as to the other items in his testimony. Petitioner can not claim prejudice when the jury was afforded all the relevant

information concerning Hess's credibility, and when there is no specific factual support showing that his testimony at trial was false.

Petitioner also alleges that all of the police officers testified falsely as to Petitioner's injuries sustained on the day of his arrest. Petitioner continues to allege that he was the victim of police brutality. Beyond Petitioner's allegations there is no specific factual support that the jury did not consider at trial. The jury heard evidence from Petitioner's treating physician and heard trial counsel's cross-examinations of each of the officers. Once again the jury was tasked with determining the credibility of the witnesses. The Court here finds no reason to question their determination and now find, without any additional factual support, that it is clear that the police officers provided false testimony. On both of these counts the relevant evidence was presented at trial and Petitioner points to no specific factual support that would be found through new evidence, therefore the transcripts are sufficient and there is no need for an evidentiary hearing to determine that Petitioner's claim is without merit.

VII. Lack of Appellate Review of Life Sentence

Petitioner argues that due process requires a mandatory review by the West Virginia Supreme Court of Appeals for any case wherein a person who receives a life sentence. This exact issue has been addressed by the West Virginia Supreme Court of Appeals.

> "West Virginia does not grant a criminal petitioner a first appeal of right, either statutorily or constitutionally. However, our discretionary procedure of either granting or denying a final full appellate review of a conviction does not violate a criminal Petitioner's guarantee of due process and equal protection of law." *Syl. Pt. 4, Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990).

The Court is guided by the decision of the West Virginia Supreme Court of Appeals and does not have discretion to overturn the Court's ruling which is directly on point. The West

Virginia Supreme Court of Appeals has determined that Petitioner's due process rights remain unaffected, therefore Petitioner's claim here is found to be without merit. Since this issue is purely legal there is no need for an evidentiary hearing on this matter.

VIII. UNSUPPORTED GROUNDS

In the final section of Petitioner's Amended Petition for Writ of Habeas Corpus there are various grounds plucked from those provided by the West Virginia Supreme Court of Appeals known as a Losh List. The Court finds none of these claims valid and denies Petitioner the relief requested on each of these claims. The claims seem to be selected from the Losh list and given scant factual support, also many of those listed in this section are duplicative of items previously raised in the more developed sections of Petitioner's Amended Petition. Once again, specificity is required in habeas pleadings and a mere recitation of a ground without factual support does not warrant the grating of a petition. After reviewing each of these claims the Court finds that many of the issues have been already addressed in this order and the remaining claim lack sufficient factual support or are denied because the transcript is clear and the claim lack merit. Furthermore, there is no need for an evidentiary hearing because first, Petitioner has pointed to no facts that would be brought to light upon an evidentiary hearing that support these various claims, and second, the transcript is clear on all issue in which Petitioner does provide some factual support and the Court has sufficient information to find that each of the claims is without merit.

IX. Losh List

Petitioner expressly waived certain grounds on the Losh List he filed, and thus is not entitled to relief on any of those grounds. *Losh v. McKenzie,* 166 W. Va. 762 (1981). Petitioner expressly waived ground: 3, 6, 10, 12-13, 31, 35-36, 38, 46, and 49. Furthermore, the Court may "summarily deny unsupported claims that are randomly selected from the list of grounds," laid out in *Losh v. McKenzie*. *Losh v. McKenzie,* 166 W. Va. 762, 771 (1981); *Markley v. Coleman,* 215 W. Va. 729, 733 (2004). Therefore, any grounds not expressly waived under Petitioners Losh List, but which Petitioner did not address in his Petitioner are hereby summarily denied.

Accordingly, the Court DENIES Petitioner's Amended Petition for Writ of Habeas Corpus and Request for 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 the relief requested in the Petition for Writ of Habeas Corpus is DENIED.

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

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A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: _____
Deputy Clerk

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