

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

**Karl C. Finney,
Petitioner Below, Petitioner**

vs.) No. 11-1294 (Mercer County 11-C-416-OA)

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

FILED

September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Karl C. Finney appeals, pro se, the September 7, 2011 order of the Circuit Court of Mercer County denying his petition for a writ of habeas corpus. The respondent warden, by Jake Morgenstern, his attorney, filed a summary response to which petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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 that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was convicted of first degree murder without a recommendation of mercy in 1991. His direct petition for appeal was refused by this Court in 1992. Petitioner filed his first petition for a writ of habeas corpus in 2000, in Civil Action No. 00-CV-0495-K, which the circuit court refused on August 15, 2005.¹ This Court refused petitioner's appeal from the denial of habeas relief on May 11, 2006.

Petitioner filed a second habeas petition in 2006, in Civil Action No. 06-C-616-OA, which was amended in 2009.² His sole ground asserted was ineffective assistance of his prior habeas counsel. The circuit court found no ineffective assistance of counsel and denied petitioner's second petition on March 15, 2010. This Court affirmed the circuit court's March 15, 2010 order by a memorandum decision dated April 18, 2011.

¹ In No. 00-CV-0495-K, petitioner had a habeas corpus hearing on April 15, 2005, and continued on April 20, 2005, at which he was represented by counsel.

² In No. 06-C-616-OA, petitioner had a habeas corpus hearing on October 28, 2009, at which he was represented by counsel. Petitioner was represented by a separate attorney on appeal.

Petitioner filed his third habeas petition on August 9, 2011. Petitioner's two asserted grounds for habeas relief were: (1) ineffective assistance of habeas counsel and (2) a claim based upon *In the Matter of: Renewed Investigation of the State Police Crime Laboratory, Serology Division* ("Zain III"), 219 W.Va. 408, 633 S.E.2d 762 (2006) (governing habeas petitions in cases where a state police serologist other than Fred Zain offered evidence). The circuit court held both claims were barred by the doctrine of res judicata based upon a finding that "the Petitioner has raised *grounds* which were raised in the prior proceeding or which with reasonable diligence could have been known and raised (emphasis added)."³ Accordingly, the circuit court denied petitioner's third petition.

The standard for this Court's review of the circuit court's order denying petitioner's third habeas petition is set forth in Syllabus Point One, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006):

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.

On appeal, Petitioner argues that his case qualifies for appointment of counsel and an evidentiary hearing pursuant to *Zain III*. The respondent warden argues that the circuit court correctly found that the claims raised in petitioner's instant petition constituted matters that have either been raised in prior proceedings, or with reasonable diligence, could have been; thus, the claims are barred by the doctrine of res judicata. *See* Syl. Pt. 2, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981) (holding that the doctrine may bar subsequent habeas proceedings provided that certain conditions are met). The respondent warden argues that petitioner's petition did not raise any issue that would have entitled him to a subsequent habeas proceeding. The respondent warden further argues that petitioner's petition contained no exhibits, affidavits, or other documentary evidence to support his allegations. After careful consideration of the parties' arguments, this Court concludes that the circuit court did not abuse its discretion in denying petitioner's third habeas petition.

For the foregoing reasons, we find no error in the decision of the circuit court and its order denying petitioner's petition for a writ of habeas corpus is affirmed.

Affirmed.

³ The circuit court's use of the plural "grounds" indicates that contrary to petitioner's contention, the court was cognizant of the fact that his petition alleged more than just ineffective of assistance of habeas counsel.

ISSUED: September 4, 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