

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

**Anthony Pfeffer,
Petitioner Below, Petitioner**

FILED
October 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-1341 (Jackson County 11-C-96)

**Adrian Hoke, Warden, Huttonsville
Correctional Center, Respondent Below,
Respondent**

MEMORANDUM DECISION

Petitioner Anthony Pfeffer, pro se, appeals the August 17, 2011, order of the Circuit Court of Jackson County summarily dismissing his petition for a writ of habeas corpus. The respondent warden, by C. Casey Forbes, his attorney, filed a summary response to which petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In 1985, petitioner robbed the Ripley, West Virginia, Foodland by brandishing a firearm at employees. Petitioner stole \$5,825 in cash, checks, and food stamps. Two Foodland employees positively identified petitioner, and his fingerprints were found at the scene. Petitioner had no money the day before the crime, but the day after the crime, he took his friends on a shopping spree using cash. Petitioner was later seen burning checks and food stamps. Petitioner was indicted for aggravated robbery. *See* W.Va. Code § 61-2-12(a)(2).

Petitioner and the State entered into a plea agreement pursuant to Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, in which petitioner would plead guilty to aggravated robbery and would receive a thirty year sentence to be served concurrently with a sentence imposed in federal court. The plea agreement provided that "[t]he Defendant hereby acknowledges that he has been informed that although this agreement is binding upon the State and the Defendant, the same may be rejected by the Court at any time prior to the imposition of sentence."

At a September 15, 1986, hearing, the circuit court inquired into petitioner's knowledge of and voluntariness in entering the plea agreement. The circuit court then stated that "[t]he plea agreement will be accepted and filed." The circuit court further stated the following: "This matter will be considered for pre-sentence investigation. This acceptance and adjudication of guilt are both conditional upon final approval of the court upon imposition of sentence and the matter will be investigated before that." The circuit court also expressed some concern that the plea agreement infringed on the court's power to sentence petitioner, particularly because of the concurrent nature of the proposed sentence. Petitioner was represented by Joseph Hash Jr.

Subsequently, a pre-sentence investigation report was filed, in which the probation officer set forth petitioner's criminal record and recommended a harsher sentence. At the sentencing hearing, the State asked the circuit court to reject the plea agreement and impose a harsher sentence asserting that petitioner had failed a polygraph test and that petitioner might not have cooperated with a criminal investigation in another county. Petitioner asserted that these things were not required by his plea agreement. The circuit court rejected the plea agreement and set the case for trial.

At trial, the jury found petitioner guilty of aggravated robbery as charged. Petitioner was sentenced to thirty years in prison to run consecutively to the sentence imposed in federal court. The circuit court cited petitioner's prior criminal record and the use of the firearm in commission of the offense. Petitioner appealed his conviction and sentence to this Court which refused his appeal in March of 1988.

In June of 2004, petitioner filed a pro se petition for a writ of habeas corpus which, *inter alia*, made claims regarding the rejection of the plea agreement. The circuit court did not appoint counsel or hold a hearing on the 2004 habeas petition. By an order of August 19, 2004, the circuit court summarily denied the habeas petition. The circuit court ruled that the court previously rejected the plea agreement after reviewing the adverse pre-sentence investigation report and because the court found that the agreement unduly infringed on its sentencing authority. The circuit court ruled that the State's statements were harmless and not the basis for the court's decision to reject the agreement. Petitioner filed a pro se petition for appeal to this Court, which was refused in June of 2005. A petition for a writ of certiorari to the Supreme Court of the United States was denied.

Petitioner filed a second habeas petition in the circuit court in November of 2006. Counsel was appointed, and an omnibus hearing was conducted on October 25, 2007, and April 7, 2008. On September 6, 2009, the circuit court entered a final order that denied the habeas petition. The circuit court ruled that many of the issues were addressed in the first habeas proceeding and thus were barred by the doctrine of res judicata, but the court also went on to find that the allegations also lacked substantive merit. The circuit court found that the plea agreement had been accepted only conditionally pending a pre-sentence investigation. *See* Syl. Pt. 14, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984) (stating that under Rule 11, a circuit court may accept a plea made pursuant to a plea agreement and condition the plea's acceptance upon the

receipt of a pre-sentence report, and then may reject the plea agreement after the consideration of the report, in which event the court shall permit the defendant to withdraw his plea). The circuit court ruled that when rejecting the plea agreement, the court relied upon the pre-sentence report and the court's concern that the agreement infringed upon its sentencing power, not upon the State's comments. The circuit court rejected petitioner's claim of ineffective assistance of counsel, finding, *inter alia*, that because the court did not err in rejecting the plea agreement, it was not ineffective for counsel not to have objected to the court's action. Petitioner appealed the circuit court's denial of his 2006 habeas petition to this Court which refused his appeal by an order entered January 28, 2010.*

On July 22, 2011, petitioner filed a third habeas petition raising three grounds of relief. The first two grounds alleged that in the prior habeas proceedings, the circuit court failed to make factual determinations on whether the court accepted a Type C plea agreement and on whether the State materially breached the plea agreement when it requested that the plea agreement be rejected. In summarily dismissing petitioner's third petition, the circuit court found that "these grounds plainly have no merit, because they have been previously, finally decided." Petitioner's third ground of relief alleged that habeas counsel was ineffective in not raising the following two claims: (1) trial counsel failed to object to the State's request that the plea agreement be rejected; and (2) trial counsel failed to object to the circuit court's rejection of the plea agreement. The circuit court found that "[t]hese claims [against trial counsel] obviously have no merit." The circuit court reasoned as follows:

. . . It has been twice before fully decided that the trial court did not violate [petitioner]'s rights by rejecting the plea agreement, and it has been decided in CA No. 06-C-150, that the trial court did not commit any violation of Rule 11, WVRCrP. Defense Counsel's alleged failure to object, even if true, is immaterial and did not affect the substantial rights of the Petitioner, The fact is that no error was committed by the trial court in the case that resulted in [petitioner]'s current incarceration.

Petitioner now appeals the circuit court's summary dismissal of his third habeas petition.

The appropriate standard of review 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

* In addition, by a memorandum decision entered June 29, 2012, this Court affirmed the circuit court's denial of a motion for correction of illegal sentence. One of the issues petitioner raised in his motion was whether trial counsel was ineffective when he did not object to the State's request that the plea agreement be rejected.

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 asserts that the fact finding in his prior habeas proceedings was deficient and that the circuit court never came to firm conclusions on whether the court conditionally accepted his plea agreement and on whether the State materially breached the plea agreement by requesting that it be rejected. Petitioner further asserts that if he is correct that the circuit court never conclusively decided those issues, habeas counsel was ineffective in not raising the two claims concerning trial counsel's performance. The respondent warden argues that the orders out of the 2004 and 2006 proceedings were adequate under the law and that petitioner wanted the circuit court to conduct an improper "appellate review" of its own previously entered final orders. The respondent warden further argues that habeas counsel's performance was not deficient for failing to raise meritless issues.

Because petitioner has had prior habeas proceedings, Syllabus Point Two, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), applies to his case:

A judgment denying relief in post-conviction habeas corpus is *res judicata* on questions of fact or law which have been fully and finally litigated and decided, and as to issues which with reasonable diligence should have been known but were not raised, and this occurs where there has been an omnibus habeas corpus hearing at which the applicant for habeas corpus was represented by counsel or appeared *pro se* having knowingly and intelligently waived his right to counsel.

In his 2006 habeas proceeding, petitioner was appointed counsel and provided with an omnibus hearing after which the circuit court denied petitioner's petition. The circuit court found that the plea agreement had been accepted only conditionally pending a pre-sentence investigation and that when rejecting the plea agreement, the court relied upon the pre-sentence report and the court's concern that the agreement infringed upon its sentencing power, not upon the State's request that the agreement should be rejected. When petitioner has made claims of ineffective assistance, such claims are grounded in his continued belief that the circuit court and/or the State improperly caused the plea agreement to be rejected. Therefore, this Court finds that in his third habeas petition, petitioner raised claims that had previously been fully and finally adjudicated in earlier proceedings. The Court concludes that the circuit court did not abuse its discretion in summarily dismissing Mr. Pfeffer's third habeas petition.

For the foregoing reasons, we find no error in the decision of the Circuit Court of Jackson County and its August 17, 2011, order denying petitioner's petition for a writ of habeas corpus is affirmed.

Affirmed.

ISSUED: October 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman

DISQUALIFIED:

Justice Thomas E. McHugh