

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

**Randall Jachelski,
Petitioner Below, Petitioner**

vs.) No. 11-1443 (Taylor County 11-C-3)

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

FILED

September 21, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Randall Jachelski, pro se, appeals the September 26, 2011, order of the Circuit Court of Taylor County denying his petition for a writ of habeas corpus. The respondent warden, by Benjamin F. Yancey III, 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.

Two felony indictments were returned against petitioner. In Felony No. 03-F-50, Counts I and II each charged petitioner with uttering checks in violation of West Virginia Code § 61-4-5. In Felony No. 03-F-51, Count I charged petitioner with forgery of a "physician prescription form" in violation of West Virginia Code § 61-4-5, Count II charged petitioner with uttering the forged "physician prescription form" also in violation of West Virginia Code 61-4-5,¹ and Count III charged

¹West Virginia Code § 61-4-5 provides in pertinent part as follows:

If any person forge any writing, other than such as is mentioned in the first and third sections of this article, to the prejudice of another's right, or utter or attempt to employ as true such forged writing, knowing it to be forged, he shall be guilty of a felony and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years, or, in the discretion of the court, be confined in jail not more than one year and be fined not exceeding five hundred dollars.

petitioner with obtaining possession of a controlled substance by misrepresentation, fraud, forgery, etc. in violation of West Virginia Code § 60A-4-403.² Each count of uttering or forgery carried a possible sentence of one to ten years in prison. Obtaining possession of a controlled substance by misrepresentation, fraud, forgery, etc. carried a possible sentence of one to four years in prison.

The State and petitioner entered into a plea agreement where petitioner agreed to plead guilty to Count I (forgery of a prescription) and Count II (uttering the forged prescription) of the indictment in Felony No. 03-F-51 and the State agreed to dismiss Counts I and II (uttering checks) of the indictment in Felony No. 03-F-50 and Count III (obtaining possession of a controlled substance by misrepresentation, fraud, forgery, etc.) of the indictment in 03-F-51.³ At the plea hearing, the circuit court accepted petitioner's guilty plea and found it to be freely, knowledgeably, and voluntarily given. Petitioner answered "[y]es, Your Honor" to the question, "You acknowledge the penalties forgery and uttering are each possible penitentiary sentence of not less than one nor more than ten years. . . . Do you understand that?" The circuit court sentenced petitioner to two concurrent sentences of one to ten years in prison for forgery and uttering (Counts I and II in 03-F-51).

However, after a confusing dialog among the circuit court, the State, and petitioner's counsel, the circuit court sentenced petitioner a second time, to two concurrent sentences of one to four years, which was the statutorily prescribed sentence for dismissed Count III (obtaining possession of a

W.Va. Code § 61-4-5(a).

² West Virginia Code § 60A-4-403 provides in pertinent part as follows:

(a) It is unlawful for any person knowingly or intentionally:

(3) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(b) Any person who violates this section is guilty of a felony, and, upon conviction, may be imprisoned in the penitentiary for not less than one year nor more than four years, or fined not more than thirty thousand dollars, or both.

W.Va. Code §§ 60A-4-403(a)(3) and (b).

³ As part of the plea agreement, petitioner also agreed to plead guilty to the separate misdemeanor of driving under the influence, first offense, for which he received ninety days in jail, to be served concurrently.

controlled substance by misrepresentation, fraud, forgery, etc.). Following the plea hearing, in the sentencing order, the circuit court imposed the original sentence of two concurrent terms of one to ten years in prison for forgery and uttering.

Beginning in June of 2006, petitioner filed a series of motions for correction of sentence, each of which was denied. Petitioner argued that because he was guilty of forgery of a prescription and uttering the forged prescription, he should have been sentenced to two concurrent terms of one to four years in prison pursuant to West Virginia Code § 60A-4-403. In its August 16, 2010, order denying petitioner's second motion for correction of sentence, the circuit court explained why petitioner's argument was erroneous:

3. At the Sentencing[/Plea] Hearing, held on May 1, 2003, the Court incorrectly stated that the Defendant was sentenced to serve a sentence of not less than one (1) nor more than four (4) years on each count of the Indictment. This is the sentence set by the Legislature for the offense of "Acquiring or obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge", a violation of West Virginia Code § 60A-4-403(a)(3). West Virginia Code § 60A-4-403(a)(3) thus criminalizes the act of "acquiring or obtaining possession of a controlled substance" through the use of a forged writing. However, the forging and subsequent uttering of a prescription are separate and distinct offenses, and each carry a sentence of not less than one (1) nor more than ten (10) years in the West Virginia Penitentiary.

The circuit court further noted that "[t]he sentences given the Defendant were in accordance with the proper code section [West Virginia Code § 61-4-5] as charged at the time of sentencing" and that "in all plea documents, the Defendant stated that he understood the possible penalty for the offenses to which he was entering a guilty plea was not less than one (1) nor more than ten (10) years."

Beginning in January of 2011, petitioner filed a series of petitions for a writ of habeas corpus re-raising the same issue.⁴ In its September 26, 2011, order denying petitioner's third habeas petition, the circuit court ruled as follows: "The Court hereby incorporates by reference all previous orders entered in these matters and declines to revisit the Petitioner's contentions, having previously found them to be without merit." 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):

⁴ Petitioner also raised the issue in this Court by filing an original jurisdiction habeas petition on August 25, 2010. That petition was refused by an order entered October 27, 2010.

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, in arguing he should have been sentenced under West Virginia Code § 60A-4-403, petitioner attaches significance to the fact that the indictment in Felony No. 03-F-51 used the phrase “physician prescription form.” However, West Virginia Code § 60A-4-403 does not use the phrase “physician prescription form.” As the respondent warden points out, West Virginia Code § 60A-4-403 does not punish the forgery, and the uttering, of a document such as a prescription; rather, West Virginia Code § 60A-4-403 punishes obtaining possession of a controlled substance by misrepresentation, fraud, forgery, etc. The statute that punishes the forgery, and uttering, of “any writing,” is West Virginia Code § 61-4-5, which provides for a sentence of one to ten years in prison. Therefore, after careful consideration, this Court concludes that the circuit court did not abuse its discretion in denying petitioner’s third habeas petition.⁵

For the foregoing reasons, we find no error in the decision of the circuit court and its September 26, 2011, order denying petitioner’s petition for a writ of habeas corpus is affirmed.

Affirmed.

ISSUED: September 21, 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

⁵ Petitioner also argues that he should at least be re-sentenced so that he could bring a direct appeal against his two concurrent sentences under West Virginia Code § 61-4-5. But, as the respondent warden notes, a direct appeal would avail petitioner nothing because he would be making the same argument as he does in the instant appeal.