

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

**James Drake,
Petitioner Below, Petitioner**

vs) **No. 11-1606** (Mercer County 10-C-539)

**David Ballard, Warden,
Respondent Below, Respondent**

FILED

February 11, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner James Drake, by counsel Paul R. Cassell, appeals the Circuit Court of Mercer County's order entered on October 17, 2011, denying his petition for writ of habeas corpus. Respondent Warden Ballard, by counsel Scott E. Johnson, 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.

Petitioner pled guilty to two counts of first degree murder and one count of malicious wounding, and was sentenced to two life sentences with mercy and to two to ten years of incarceration, all to run consecutively. Petitioner filed several motions for reconsideration of his sentence, and all were denied. Petitioner then filed a habeas petition, and counsel was appointed to file an amended petition. The amended petition alleged an involuntary guilty plea, lack of mental competency, excessive sentence, and a more severe sentence than anticipated. The circuit court denied habeas relief after an omnibus hearing.

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).

On appeal, petitioner argues that his counsel was ineffective in failing to fully investigate his mental state and condition at the time of his criminal proceeding, and that counsel may have overlooked mental health defenses. Petitioner also argues that his consecutive sentences were disproportionate based on his young age, lack of prior criminal history, and remorse. In response, the State argues that there was no ineffective assistance of counsel as all of the medical professionals who examined petitioner found him criminally responsible and competent to stand trial. The State also argues that petitioner's sentence was not disproportionate, as he murdered his mother and father and shot his sister. Thus, the State argues that the sentence does not shock the conscience, is within statutory limits and therefore not subject to review.

Our review of the record reflects no clear error or abuse of discretion by the circuit court. Having reviewed the circuit court's "Order Denying Petitioner's Amended Petition for Writ of *Habeas Corpus*" entered on October 17, 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 order.

Affirmed.

ISSUED: February 11, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

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JULIE BALL
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.*
JAMES WALTER DRAKE,

V.

CIVIL ACTION NO.: 10-C-539-OA

DAVID BALLARD, Warden
Mount Olive Correctional Facility.**ORDER DENYING PETITIONER'S
AMENDED PETITION FOR WRIT OF *HABEAS CORPUS***

On September 19, 2011 a final omnibus evidentiary hearing began in this matter, having concluded on October 5, 2011. The Court considered the testimonies and arguments set forth during the hearings in addition to a thorough review of the official Court files and pertinent legal authorities to assist in rendering a final decision in this matter.

The Petitioner, James Walter Drake, appeared in person and by counsel, Paul R. Cassell, Kelli L. Harshbarger, Assistant Prosecuting Attorney, appeared as a representative of the Respondent.

The Petitioner brings his petition for writ of habeas corpus on the grounds of ineffective assistance of counsel with regard to his mental competency at the time of trial and his attorneys' failings to take into consideration the psychological report concerning his criminal responsibility for his actions. Additionally, the Petitioner complains that he received a disproportionate sentence for the offenses to which he pled.

WHEREUPON, after deliberations, the Court does hereby conclude that relief should be **DENIED**. In support of this conclusion, the Court issues the following **FINDINGS of FACT** and **CONCLUSIONS of LAW**:

11. On July 28, 1997, the Petitioner entered a guilty plea to two counts of First Degree Murder, with mercy, and to one count of Malicious Wounding.
12. On August 29, 1997, the Petitioner was sentenced to two life sentences with mercy and to two (2) to ten (10) years in prison, and that the sentences were to run consecutively.
13. On September 25, 1997, the Petitioner, by counsel, filed a motion to reconsider his sentence pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure. This motion was denied on September 30, 1997.
14. On January 7, 1998, the Petitioner, pro se, filed a motion for the production of documents, requesting all transcripts of any and all hearings pertaining to his case, all discovery materials, a copy of the complete court record, the Grand Jury minutes, a listing of the names of the Grand Jurors as well as all pleadings filed on his behalf and by the prosecuting attorney. By Order entered on January 8, 1998, the Court ordered that all such documents be forwarded to the Petitioner at his place of incarceration.
15. On July 24, 2002, the Petitioner, pro se, filed another motion to reconsider sentencing, alleging, among other things, that he was "deeply remorseful" for his actions; that he "had no prior criminal record;" and that he had completed some rehabilitation classes and enrolled in several vocational courses while incarcerated. This motion was denied by Order entered on July 29, 2002.
16. On February 13, 2009, the Petitioner, pro se, filed another motion to reconsider sentence, again alleging that he was deeply remorseful and had no prior criminal record and that he had "accepted responsibility for his actions." By Order entered on July 21, 2009, the Petitioner's third motion for reconsideration of his sentence was denied.
17. On January 11, 2010, the Petitioner, pro se, filed for habeas corpus relief.

found that the Petitioner was competent to participate in the habeas proceeding and has the present ability to consult with his attorney with a reasonable degree of a rational understanding and assist in his own defense.

23. Dr. Clayman's report ultimately concluded that the Petitioner was competent to accept a plea bargain; that the Petitioner exhibited sufficient understanding of the legal process and the issues involved in his case presently and in 1997; that the Petitioner was not suffering from a mental disease or defect such that he would have been unable to understand the wrongfulness of his reactions or to have conformed his behavior in accordance with the law; and that there was no evidence of any diagnosable condition that would have rendered the Petitioner not responsible for his actions or unable to have formed intent [of the double homicide and malicious wounding of his sister].

24. The habeas proceeding took place on two days: September 19, 2011, and October 5, 2011.¹

25. The Court heard the testimonies of Dr. Miller and Dr. Clayman. Neither expert witness opined that the Petitioner was incompetent at the time of the crime or presently.

II. Standards Governing Habeas Review

West Virginia Code § 53-4A-1 *et seq.* "clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding during which he must raise all grounds for relief which are known to him or which he could, with due diligence, discover." Syl. Pt. 1, *Gibson v. Dale*, 173 W.Va. 681 (1984).

¹ Although held on two separate days, for clarity, unless dates are specified, the two day hearing will be collectively referred to as the 'omnibus habeas corpus hearing.'

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.

During the omnibus habeas corpus hearing, the Petitioner claimed that his former trial counsel, Tracy Burks, Esq. and Henry Harvey, Esq. were ineffective due to their failure to appropriately address the issues of his mental competency. The Petitioner specifies segments of the 1997 psychological report provided to his attorneys: that the Petitioner expressed an "aura of unreality during the time of the events [murders/shooting]"; that the Petitioner was diagnosed with Borderline Intellectual Functioning; that the Petitioner had "minimal understanding of the range and nature of possible pleas, verdicts, and penalties"; and that the Petitioner had a self-defeating attitude that may limit his "ability to protect himself and utilize available legal safeguards as he seems to have a predetermination to be punished." Basically, because of the aforementioned psychological profile offered by the reviewing psychologist, the Petitioner claims ineffective assistance of trial counsel because his attorneys failed to follow up on these potential mental issues associated with the Petitioner's offenses, and further, the Petitioner's attorneys allowed the Petitioner to enter a plea to the offenses.

The plea paperwork contained in the official court file, to which the Petitioner signed his name, is relevant to these proceedings: In the Statement in Support of Guilty Plea, on Page 2, Question number 18 reads: "Have you been treated at any time for any mental illness?" The Petitioner's answer to same was "No." The following Question number 19 reads: "Are you under treatment now." The Petitioner's answer to same was "No." On Page 3, Question number 13 reads: "Do you plead guilty of your own free will?" The Petitioner answered, "Yes."

State's argument that the Petitioner received a generous plea deal, given the seriousness of the offenses, and that it might have been tantamount to legal malpractice had the Petitioner's trial counsel NOT permitted the Petitioner to accept the plea agreement and tempt the hands of fate with a jury trial. The precautions taken by the Petitioner's trial counsel in counseling their client to accept the plea agreement as opposed to taking the case to trial is essentially trial strategy: the Petitioner had made a voluntary confession of his crimes to the police; the Petitioner's mother made a dying declaration identifying the Petitioner as her killer; there was evidence of the Petitioner's flight; and the Petitioner's sister testified against him during the preliminary hearing, also identifying the Petitioner as the culprit of the crimes as alleged. Facing the insurmountable evidence against their client, without a mental incapacity defense, and the extreme likelihood that the Petitioner would be adjudicated guilty of all charges WITHOUT mercy, the Petitioner's trial counsel managed to negotiate a plea deal where the Petitioner could be paroled after serving thirty-two (32) years. Accordingly, the Court further FINDS and CONCLUDES that based upon the court record that there is a reasonable probability that, even assuming *arguendo* counsel's omissions/errors, the result of the proceedings would have been different – but with dire consequences for the Petitioner.

The second ground alleged by the Petitioner is that he received a disproportionate sentence violating his state and federal constitutional rights. The Petitioner contends that the two life sentences with mercy and the two to ten year prison term, all to run consecutively, shock the conscience. Although the Petitioner pled guilty to murdering his parents and shooting his sister, he had minimal criminal history, he was just twenty years old, and he was very remorseful for his actions. The Petitioner relies upon some of the comments made by the psychological

burden of proof. Further, any issues that should have been known, and were raised, are now considered waived.

IV. Ruling

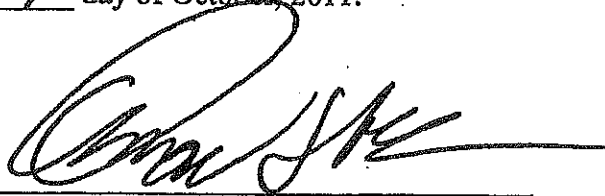
WHEREFORE, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** by this Court that the *Petition for Writ of Habeas Corpus* is **DENIED**.

The Petitioner is hereby advised of his right to appeal this Order to the West Virginia Supreme Court of Appeals. The Petitioner is advised that if he cannot afford to employ and attorney to handle his appeal, the Court will appoint him counsel for said purposes. This is a final order.

The Clerk is directed to forward a copy of this Order to the Petitioner at the Mount Olive Correctional Complex; to Paul R. Cassell, Esq., Counsel for the Petitioner; and to the Mercer County Assistant Prosecuting Attorney, Kelli L. Harshbarger, Esq.

This matter, having accomplished the purpose for which it was instituted, it is hereby ordered **DISMISSED** and **OMITTED** from the docket of this Court.

ENTERED this the 17th day of October, 2011.



OMAR J. ABOULHOSN, CHIEF JUDGE
9th Judicial Circuit of Mercer County

A143