STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff below, Respondent

vs) No. 11-0042 (Ohio County 08-F-12)

Richard E. Kartman,
Defendant below, Petitioner

FILED
May 16, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Richard E. Kartman entered an *Alford*[1] plea to first degree robbery and was sentenced to sixty years in prison. Petitioner appeals his conviction and sentence, arguing that his plea was coerced due to ineffective assistance of his trial counsel, and that his sentence of sixty years is excessive.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. 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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was indicted on charges of first degree robbery as well as being a person prohibited from possessing a firearm due to a prior felony conviction and due to being a drug addict. Petitioner's appointed trial counsel moved to withdraw approximately three months after petitioner's indictment, stating that the attorney client relationship was "destroyed and irreparable." The circuit court, after conducting a hearing on the matter, did not allow petitioner's trial counsel to withdraw, but did appoint co-counsel. Petitioner thereafter entered an *Alford* plea to one count of first degree robbery, and the other two counts were dismissed. The plea agreement specifically stated that the State intended to recommend a

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1970)

sixty year sentence. Petitioner currently has a pending habeas appeal that has been stayed until this appeal is finalized.

Petitioner's first assignment of error is that he was coerced into entering an *Alford* plea due to ineffective assistance of his trial counsel. As recognized in *State v. Frye*, 221 W.Va. 154, 650 S.E.2d 574 (2006), when an issue of ineffective assistance of counsel has been presented for the first time on appeal rather than the preferred method of seeking relief through a habeas corpus proceeding, and the Court lacks rulings from the circuit court to provide a basis for such review, the applicable standard of review is found in Syllabus Point Five of *State v. Miller*, 194 W.Va. 3, 459 S.E. 2d 114 (1995):

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (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, 459 S.E.2d 114 (2006).

In the case-at-bar, the transcripts of some of the relevant hearings were not before this Court. This Court has recognized that "'it is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal.'" *State v. Miller*, 194 W.Va. 3, 14, 459 S.E.2d 114, 125 (quoting *State v. Triplett*, 187 W.Va. 760, 771, 421 S.E.2d 511, 522 (1992)). As the Court explained in *State v. Miller*, this is due to the undeveloped state of the record:

> The very nature of an ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal. To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies.

194 W.Va. at 15, 459 S.E. 2d at 126.

Moreover, there is a pending habeas petition filed below regarding ineffective assistance of counsel. This Court has held that:

> An incarcerated individual who raises an issue on direct appeal that was not the subject of a previous petition seeking post-conviction relief under West Virginia Code § 53-4A-1 (1967) (Repl.Vol.2000) is not prohibited from seeking habeas corpus relief following the issuance of an opinion by the West Virginia Supreme Court of Appeals where the decision on the appeal does not contain any ruling on the merits of the issue, as no final adjudication within the meaning of West Virginia Code § 53-4A-1 has resulted.

Syl. Pt. 4, *State v. Frye ,* 221 W.Va. 154, 650 S.E.2d 574 (2006). In the case-at-bar, the Court concludes that the record is not properly developed to permit review of this issue on its merits. Therefore, because this Court declines to address the merits of petitioner's ineffective assistance of counsel claim, relief in the form of habeas corpus is not barred under the provisions of West Virginia Code § 53-4A-1 as the result of petitioner's having instituted a direct appeal raising the issue.

Petitioner's second assignment of error is that his sentence is excessive, based on punishments received by defendants who committed similar crimes in neighboring jurisdictions as well as a number of states that have lower maximum punishments for the same or similar crimes. This Court has held that criminal sentences within the statutory limits of a crime, unless based on some impermissible factor, will not subject to appellate review. *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007). The sentence for first degree robbery in West Virginia, pursuant to West Virginia Code §61-2-12 is no less than ten years. In the present case, the victim alleges that petitioner "kicked in" her door and robbed her at gunpoint. This Court has previously upheld a sentence of sixty years for armed robbery in *State v. Spence,* 182 W.Va. 472, 388 S.E.2d 498 (1989), where there was no physical injury of the victim and the defendant had prior similar convictions. Further, the Court notes that in the present case, Petitioner agreed to a plea agreement wherein the State specifically stated "The State of West Virginia will recommend that the Defendant be sentenced to sixty (60) years in the West Virginia Penitentiary", thus placing the petitioner on notice of the potential for the imposition of such sentence. Therefore, under the facts of this case, Petitioner's sentence is not found to be excessive, and we find no error in the circuit court's order.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 16, 2011

CONCURRED IN BY:

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