

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

**Joseph Shaw,
Petitioner Below, Petitioner**

vs) No. 12-0419 (Kanawha County 11-MISC-567)

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

FILED

May 24, 2013

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

MEMORANDUM DECISION

Petitioner Joseph Shaw, *pro se*, appeals the circuit court's order entered March 12, 2012, denying his petition for writ of habeas corpus. Warden Ballard of Mount Olive Correctional Center, by counsel Laura Young, filed a response in support of the circuit court's order.

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 Rules of Appellate Procedure.

Petitioner entered a guilty plea for two counts of sexual assault, after being indicted by grand jury, in a criminal proceeding before the circuit court on September 25, 2006. Petitioner was sentenced to two consecutive terms of ten to twenty-five years of incarceration. On November 30, 2011, petitioner filed a *pro se* petition for writ of habeas corpus in the circuit court, alleging ineffective assistance of counsel, that fraudulent statements were made and relied up on by the grand jury, which unduly pressured him to take a guilty plea, and that he was coerced into a guilty plea by counsel. The circuit court dismissed each of these arguments by stating that none of the identified acts of counsel were "outside the broad range of professionally competent assistance." The circuit court further stated that petitioner specifically waived his right to challenge pretrial proceedings and that he freely, voluntarily, intelligently, knowingly, and understandingly tendered his written and oral guilty pleas.

On appeal, petitioner argues the circuit court abused its discretion by denying him counsel and meaningful review of his habeas petition in a hearing. Petitioner further argues that the circuit court erred in stating that petitioner had "waived all of his constitutional rights." Respondent argues that it is within the trial court's discretion to deny a habeas corpus petition without appointing counsel or conducting an omnibus hearing and that petitioner's case was adequately adjudicated in the March of 2012 order.

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.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). This Court has previously addressed the denial of a writ of habeas corpus without holding a hearing, as follows:

“A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief.” Syl. Pt. 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

Syl Pt. 2, *State ex rel. Watson v. Hill*, 200 W.Va. 201, 488 S.E.2d 476 (1997).

The Court has carefully considered the merits of each of petitioner's arguments as set forth in his petition for appeal. The circuit court did not abuse its discretion in denying petitioner's habeas corpus petition, because the circuit court gave specific findings of fact and conclusions of law as to the manner in which each ground raised in the petition has been previously and finally adjudicated or waived. Finding no error in the denial of habeas corpus relief, the Court incorporates and adopts the circuit court's detailed and well-reasoned order dated March 12, 2012, insofar as it addresses the assignments of error appealed herein, and directs the Clerk to attach the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 24, 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

12-0419
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CATHY S. G. JCH, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOSEPH SHAW,

Petitioner,

v.

Civil Action Number: 11-MISC-567
Judge Jennifer F. Bailey

DAVID BALLARD, Warden,

Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Currently pending before the Court is Joseph Shaw's Petition for Writ of Habeas Corpus. The Court has studied said petition, the file for the underlying conviction, and all other pertinent legal authorities. As a result of these deliberations, the Court concludes that the petitioner has failed to establish a basis for the relief requested in his Petition for a Writ of Habeas Corpus.

Based on the West Virginia Post-Conviction Habeas Corpus statute, West Virginia Code §53-4A-1 *et seq.*, the Supreme Court of Appeals has said:

Every person convicted of a crime shall have a fair trial in the circuit court, an opportunity to apply for an appeal to this Court, and one omnibus post-conviction habeas corpus hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated.

Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606, 609 (1981).

Habeas corpus is not a substitute for appeal. Syl. Pt. 2, *State ex rel. Clark v. Adams*, 144 W.Va. 771, 111 S.E.2d 336 (1959). The Supreme Court has held that in order for claims to be cognizable in habeas corpus, the claims must constitute violation of some constitutional right and not simply an assertion of trial error (which may be raised only on appeal). Syl. Pt. 9, *State ex rel. Vernatter v. Warden*, 207 W.Va. 11, 528 S.E.2d 207 (1999).

In his Petition, the petitioner first asserts that he received ineffective assistance of counsel due to his trial counsel's numerous errors in violation of the constitutions of the United States and the State of West Virginia.

In West Virginia, claims of ineffective assistance of counsel are governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (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 (1995).

In reviewing defense counsel's performance in this case, the record does not reflect the identified acts or omissions were outside the broad range of professionally competent assistance. Consequently, the petitioner has not established a legitimate claim in this regard because he has not shown that his counsel's performance was deficient and prejudiced his defense. Further, many of petitioner's identified acts or omissions pertain alleged pretrial defects which were waived by the petitioner upon entry of his guilty plea. Also, upon accepting the petitioner's guilty, the Court found that the defendant had counsel competent in criminal matters, and that the defendant was totally satisfied with the representation and advice he received from said counsel.

The petitioner's second ground for habeas relief is his assertion that he was denied his "constitutional right to a fair trial, due process and equal protection when the State utilized false and perjured statements and/or testimony, a BRADY violation, thus ensuing in the State's 'known use of perjured and/or false testimony.'" More specifically, the petitioner asserts that fraudulent statements made by the victim were presented to the Grand Jury and used to gain a

guilty plea. Upon accepting the petitioner's guilty plea, the Court made specific findings that the petitioner knowingly and intelligently waived his constitutional rights including, but not limited to the right to trial by an impartial jury, the right to confront and cross-examine his accusers, the right to present witnesses in his own defense and to testify in his own defense, the right to move the Court to suppress illegally obtained evidence, and the right to challenge all pretrial proceedings. Therefore, there is no merit in this argument.

The petitioner's final ground for habeas relief is that he was unduly coerced and/or influenced into a plea agreement by counsel and the State in violation of his federal and constitutional rights of due process, equal protection and effective assistance of counsel.

When this Court accepted the petitioner's guilty plea, it was specifically found that the petitioner knowingly and intelligently waived all of his constitutional rights, and that he freely, voluntarily, intelligently, knowingly and understandingly tendered unto this Court his written and oral pleas of guilty to the charge of second degree sexual assault. Therefore, the Court finds no merit in this argument.

Furthermore, the petitioner has not demonstrated to the satisfaction of the Court a denial or infringement of his rights as to render the conviction or disposition void under the Constitution of the United States, the Constitution of West Virginia, or both.

Having reviewed the Petition for Writ of Habeas Corpus on its face, having noted no arguments therein that contain any significant merit, and noting that the questions raised do not appear to justify scheduling a hearing upon the same, the request for Writ of Habeas Corpus is hereby **DENIED**.

Accordingly, this Court **ORDERS**:

The Petition for Writ of Habeas Corpus sought by the petitioner is hereby **DENIED**.

There being nothing further, this matter is hereby **DISMISSED** and **STRICKEN** from the docket of this Court. The Circuit Clerk shall provide copies of this Order to all counsel and *pro se* parties of record. This is a Final Order.

ENTERED this Order the 12th day of March, 2012.

Jennifer F. Bailey
JENNIFER F. BAILEY, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 14
DAY OF March, 2012
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA