STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Matthew A. Hardesty,
Petitioner Below, Petitioner

vs) No. 12-0931 (Berkeley County 11-C-163)

Dennis Dingus, Warden, Stevens Correctional Center,
Respondent Below, Respondent

FILED
May 17, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Matthew A. Hardesty, by counsel Tracy Weese, appeals the Circuit Court of Berkeley County's "Final Order Denying Revised Petition for Writ of Habeas Corpus" entered on July 9, 2012. Respondent Dennis Dingus, Warden, by counsel Christopher C. Quasebarth, responds in support of the 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.

On an early morning in October of 2008, petitioner and his co-defendant, Eric Price, broke and entered into a business and stole money. They were recorded on video surveillance both before and during the crime. At a jury trial in August of 2009, petitioner was found guilty of petit larceny, breaking and entering, and conspiracy to commit breaking and entering. Petitioner was sentenced to the statutory terms of one year of incarceration for larceny, one to ten years of incarceration for breaking and entering, and one to five years of incarceration for conspiracy, said sentences to run consecutively. When imposing the maximum period of incarceration, the circuit court referred to petitioner's "extensive" criminal history. Petitioner filed a direct petition for appeal asserting that his sentence was excessive and that the trial court erred in allocating the number of peremptory strikes between petitioner and his co-defendant, who were jointly tried. This Court unanimously refused that petition for appeal.

Thereafter, petitioner, by counsel, filed a revised omnibus petition for post-conviction habeas corpus asserting excessive bail, ineffective assistance of counsel, violation of his right to a speedy trial, prejudicial joinder by trying him along with his co-defendant, and denial of peremptory strikes. Without holding an evidentiary hearing, the circuit court denied the omnibus habeas petition on all grounds. Petitioner now appeals the denial of his habeas petition. We apply the following standard of review:

> 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).

Petitioner raises a single assignment of error in this appeal: that, in light of the issues petitioner was raising, the circuit court erred by deciding the case without conducting an evidentiary hearing. In particular, he argues that an evidentiary hearing was necessary to develop evidence on his ineffective assistance of counsel claim. He argues that his lawyer was ineffective for agreeing to a continuance of trial, which in turn impacted his right to a speedy trial, and was ineffective for failing to move to sever petitioner's trial from that of the co-defendant.

We have held that an evidentiary hearing is not always required in habeas cases. "A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing . . . 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, in part, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

Upon a review of the appellate record, the parties' arguments, and the circuit court's July 9, 2012, order, we conclude that the circuit court had sufficient evidence to deny habeas relief without holding an evidentiary hearing. A criminal defendant has a constitutional right to a speedy trial within three terms of court. W.Va. Code § 62-3-21, W.Va. Const. art. III, § 14. Even assuming, arguendo, that petitioner's counsel should not have agreed to the continuance, petitioner nonetheless went to trial during the very next term of court after his indictment. Furthermore, petitioner fails to set forth a basis to support a motion to sever. The circuit court did not need to take evidence on these issues to determine that petitioner's constitutional rights were not violated. We hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignment of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's July 9, 2012, order to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 17, 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

12-0931

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Division II

STATE ex rel. MATTHEW A. HARDESTY

Petitioner,

v.

CIVIL CASE NO. 11-C-163
Underlying Criminal Case Numbers: 09-F-49
JUDGE WILKES

DENNIS DINGUS, Warden,
Stevens Correctional Center

Respondent,

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BERKELEY COUNTY
WEST VIRGINIA

FINAL ORDER DENYING REVISED PETITION FOR WRIT OF HABEAS CORPUS

This matter came before the Court this 9 day of July, 2012, pursuant to Petitioner Matthew A. Hardesty's Petition for Post-Conviction Habeas Corpus Relief. Upon the written appearance of Petitioner, Matthew A. Hardesty, by and through counsel, Tracy Weese, Esq., and Respondent, Dennis Dingus, warden of Stevens Correctional Center, in his official capacity, by and through counsel, Christopher C. Quasebarth, Esq., Chief Deputy Prosecuting Attorney, the pleadings and papers filed herein, review of the underlying case, and review of the pertinent legal authorities, the Court concludes that the Petition must be DENIED.

Procedural History

1. On the 19th of February, 2009, Petitioner and his co-defendant, Eric Price, were indicted on a four (4) count indictment for the following felonies: Conspiracy to Commit Breaking and Entering, and Breaking and Entering, as well as the following misdemeanors: Petit Larceny and Destruction of Property. Co-defendant Price was also indicted for the following misdemeanor: Shoplifting (3rd).

2. On the 26th of February, 2009, Petitioner was brought before the Court for arraignment, and trial was scheduled for the 28th of April, 2009.
3. On the 9th of April, 2009, a status hearing commenced, which was continued until the 27th of April, 2009. A pre-trial hearing scheduled for the 1st of May, 2012, was continued, finally taking place on the 20th of August, 2009.
4. On the 25th of August, 2009, Petitioner and co-defendant's trial began, which lasted until the 27th of August, 2009. At the conclusion of the trial, a jury found the Petitioner guilty of Conspiracy to Commit Breaking and Entering, guilty of Breaking and Entering, guilty of Petit Larceny, and not guilty of Destruction of Property. A jury found co-defendant guilty of the same, as well as guilty of Shoplifting.
5. On the 4th of September, 2009, Petitioner filed a Motion for Judgment of Acquittal and a Motion for New Trial, both of which were denied.
6. Following conviction, Petitioner, with the assistance of counsel, filed a Petition for Direct Appeal with the West Virginia Supreme Court of Appeals, claiming that (1) the trial court erred by allowing Petitioner three peremptory strikes instead of six at trial, and (2) the trial court erred by imposing an excessive sentence. On the 9th of September, 2010, the Petition for Appeal was refused 5-0.
7. On the 22nd of October, 2009, Petitioner, with counsel, appeared for sentencing, at which time he was sentenced to 1-10 years imprisonment on conviction of Breaking and Entering; 1-5 years imprisonment on conviction of Conspiracy to Commit Breaking and Entering; and 1 year imprisonment on conviction of Petit Larceny. All sentences were ordered to run consecutively to each other.

8. On the 28th of February, 2011, Petitioner filed a *pro-se* application for a Petition for Writ of Habeas Corpus. Counsel was subsequently appointed to file a Revised Petition for Writ of Habeas Corpus and *Losh* List.
9. On the 17th of August, 2011, Petitioner, assisted by counsel, filed a Revised Petition for Writ of Habeas Corpus and accompanying *Losh* List under case number 11-C-163.
10. On the 27th of January, 2012, pursuant to order, Respondent filed a Response to Petitioner's Petition for Writ of Habeas Corpus.

Finding of Facts

1. The indictment in this matter was reviewed by the Trial Court and found to be sufficient under Article III, Sec. 14 of the West Virginia Constitution, the West Virginia Rules of Criminal Procedure, and related authorities.
2. The indictment read, in pertinent part, as follows:

Count I: Breaking and Entering

> "That ERIC S. PRICE and MATTHEW A. HARDESTY on or about the ___ day of October, 2008 in the County of Berkeley and State of West Virginia did unlawfully and feloniously break and enter any office, shop, storehouse, warehouse, or any other house or building, to-wit: Peterson's Car Wash, with intent to commit a larceny therein, in violation of Chapter 61, Article 3, Section 12 of the Code of West Virginia, as amended, against the peace and dignity of the State."

Count II: Petit Larceny

> "That ERIC S. PRICE and MATTHEW A. HARDESTY on or about the ___ day of October, 2008 in the County of Berkeley and State of West Virginia did unlawfully, but not feloniously, steal, take and carry away the money, goods, or property of the owner, Peterson's Car Wash, of a value of less than one thousand dollars, with the intent to permanently deprive Peterson's Car Wash of possession thereof, to-wit: United States currency in the approximate amount of $200.00, all the property of Peterson's Car Wash, in violation of Chapter 61,

Article 3, Section 13(b), of the Code of West Virginia, as amended, against the peace and dignity of the State."

Count III: Destruction of Property

"That ERIC S. PRICE and MATTHEW A. HARDESTY on or about the ___ day of October, 2008 in the County of Berkeley and State of West Virginia did unlawfully, but not feloniously, destroy, injure or deface any property, to-wit: one window, the property of Peterson's Car Wash, in violation of Chapter 61, Article 3, Section 30(a) of the Code of West Virginia, as amended, against the peace and dignity of the State."

Count IV: Felony Conspiracy

"That ERIC S. PRICE and MATTHEW A. HARDESTY on or about the ___ day of October, 2008 in the County of Berkeley and State of West Virginia did unlawfully and feloniously conspire with each other for the purpose of committing the felony offense of breaking and entering, and that an overt act was committed in furtherance of that conspiracy which was subsequent to the agreement and before the conspiracy terminated, in violation of Chapter 61, Article 10, Section 31 of the Code of West Virginia, as amended, against the peace and dignity of the State."

3. At the time of his arrest, Mr. Hardesty was already on probation for previous Battery and Petit Larceny convictions. Probation was revoked incident to this arrest.

4. Petitioner's counsel at trial was Nicholas F. Colvin, Esq., following the withdrawal of Robert Barrat, Esq. as counsel, citing a complaint by Petitioner as to Mr. Barrat's representation.

5. During the pre-trial stage, Counsel filed pre-trial motions, including:

   a. a motion to reduce bail,

   b. a motion to compel discovery,

   c. a motion to preserve evidence,

   d. a motion to preserve trial by jury,

   e. a motion to suppress evidence,

   f. a motion in limine to allow Defendant to appear at trial without shackles and inmate attire.

6. Motions to reduce bail and suppress evidence in Finding of Fact ¶ 5 above were denied. The State had no objection to Defendant's motion in limine.
7. At some point prior to the April 27th pre-trial hearing, co-Defendant made a motion for a continuance, to which counsel Mr. Barrat and the State agreed.
8. At the May 1st pre-trial hearing, Defendant, through counsel Mr. Barrat, stated orally that he would like a speedy trial.
9. At the pre-trial hearing on the 20th of August, 2009, there was discussion of how many peremptory strikes should be allotted to each defendant. This discussion continued into the first day of the trial, though no motion was filed by either defendant. At the conclusion of this exchange, the trial Court ruled that each defendant would have three peremptory strikes, and the State would have two. The Court reached this conclusion reasoning that this was not a capital case, and that the court routinely decides more grave charges, and as such no good cause was shown for additional peremptory strikes.
10. At trial, the State called the following persons who gave testimonial evidence and through whom the State introduced exhibits into evidence:
    a. Patrolman S.A. Spiker, an investigating officer,
    b. Patrolman Albaugh, an investigating officer who identified Mr. Hardesty from surveillance footage, and later arrested Mr. Hardesty,
    c. Sgt. L. Witt, an investigating officer who arrested Mr. Price,
    d. PFC B. Rouse, an investigating officer who identified Mr. Price from surveillance footage,
    e. PFC Parks, an investigating officer,
    f. Patrolman Everhart, an investigating officer,

g. Brenda Braithewaite, an employee of the 7-11 from which Mr. Price shoplifted,

h. Darrell Lemen, an employee of the 7-11 from which Mr. Price Price shoplifted,

i. Jeffrey Evans, an employee of Peterson's Car Wash, the property which Defendants broke and entered,

j. Chris DeJules, manager of Weis Market where Mr. Price was arrested, and

k. Sherry Lemons, a forensic DNA analyst.

11. Evidence at trial by jury established the following:

On the 17th of October, 2008, at around 2:30 a.m., Petitioner and co-defendant Eric Price broke into a car wash and laundromat in Martinsburg, Berkeley County, West Virginia, wearing white plastic bags on their heads to hide their faces. After breaking into the building, they removed around 450 quarters from a coin machine. The break-in activated a security alarm, and law enforcement arrived minutes after the co-defendants fled the building, finding the plastic bags which were used for masks discarded nearby.

The crime was recorded on video surveillance, which was viewed a few hours later at the Martinsburg City Police Station. Approximately a half hour prior to the commission of the crime, the co-defendants reconnoitered the area with their faces visible, wearing the same clothing that they wore during the crime itself. The co-defendants were identified by Patrolman Albaugh and Patrolman Rouse, who viewed the surveillance footage, and were familiar with the defendants.

Petitioner and his co-defendant were not located until the following morning, when management of the Weis Market Grocery Store located roughly 100 yards from the scene of the crime notified the police that an individual was cashing in a large amount of quarters at the store's Coinstar machine. When law enforcement arrived, they asked Mr. Price if he had

just cashed in a large amount of coins. He admitted he did, claiming they were from his piggy bank, and showed the responding officers a Coinstar receipt. With his permission, he was then patted down for weapons, which turned up a bottle of Clonazepam, a controlled substance, for which he did not have a prescription. Mr. Price was subsequently arrested for possession of a controlled substance, and was later served with an arrest warrant for the laundromat break-in. At the time of the arrest, and subsequent photographing at the police station, Mr. Price was still wearing the very distinctive blue and gold West Virginia University hat that was visible in the surveillance footage.

Searches incident to the controlled substance arrest turned up $93.00 in cash, as well as a pack of Marlboro cigarettes and receipt for the purchase thereof, the price of which added with the cash on hand added up to the Coinstar receipt total of $97.20. An arrest warrant for Petitioner was then obtained, and the arrest made later that morning. At the time of the arrest, Petitioner was still wearing the same clothes he wore in the commission of the crime, and searches incident to that arrest produced 31 quarters.

Conclusions of Law

This matter comes before the court upon Petitioner's Petition for a Writ of Habeas Corpus. After proper review of the case filings, and the memoranda of both the Petitioner and the State, the Court finds that the Petition must be DENIED and there is no need for an evidentiary hearing.

This court has, prior to this order, appointed counsel, who filed a revised petition with accompanying *Losh* list, and subsequent to an initial review, this Court ordered the State to file an answer. The Court will review the filings, affidavits, exhibits, records, and other documentary evidence attached to the Petition, and determine whether any of Petitioner's claims

have merit, necessitating an evidentiary hearing to determine if the Writ should be granted. If, after such review, the Court is satisfied that the Petitioner is not entitled to relief, the Court may issue a final order denying the petition without such a hearing. *Syl. Pt. 1, Perdue v. Coiner,* 156 W. Va. 467 (1973); *State ex rel. Waldron v. Scott*, 222 W. Va. 122, 127 (2008).

The process of petitioning for Writ of Habeas Corpus is a civil proceeding, and shall not be in any circumstances regarded as criminal. W. Va. Code § 53-4A-1(a); *State ex rel. Harrison v. Coiner*, 154 W. Va. 467, 476 (1970). Unlike a Writ of Error or Direct Appeal, the review process for a Writ of Habeas Corpus extends only to violations of constitutional guarantees. *Edwards v. Leverette*, 163 W. Va. 567, 576 (1979).

> "If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return of other pleadings, or the record in the proceedings which resulted in the conviction and sentence…show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall enter an order denying the relief sought." W. Va. Code § 53-4A-7(a).

A denial of a Petition for Writ of Habeas Corpus by the Court will be accompanied by specific findings of fact and conclusions of laws to each contention raised by the Petitioner, and must also specifically identify why these facts and conclusions render an evidentiary hearing unnecessary. R. Hab. Corp. 9(a); *Syl. Pt. 4, Markley v. Coleman*, 215 W. Va. 729 (2004). However, if Petitioner presents "probable cause to believe that the petitioner may be entitled to some relief…the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds (in fact or law) advanced…" W. Va. Code § 53-4A-7(a).

In the Habeas Corpus petition process, as in all allegations of error, "…there is a presumption of regularity of court proceedings in courts of competent jurisdiction which remains until the contrary appears and that the burden of proving any irregularity in such court

proceedings rests upon the person who alleges such irregularity to show it affirmatively." *State ex rel. Scott v. Boles*, 150 W. Va. 453, 456-57 (1966). This affirmative showing of irregularity must be accompanied by specific factual support to warrant the issuance of a writ or holding of a hearing. W. Va. Code § 53-4A-2; *Losh v. McKenzie*, 166 W. Va. 762, 771 (1981). When a petitioner fails to supply the requisite factual support for a Habeas Corpus petition, the trial court, unable to render a fair adjudication of the issues, may dismiss the Petition without prejudice. R. Hab. Corp. 4(c); *Markley v. Coleman*, 215 W. Va. 729, 734 (2004). The Court may also, in the case of grounds unsupported by fact or law randomly selected from the *Losh* list form, summarily deny such claims. 166 W. Va. at 771; 215 W. Va. at 733.

Issues which have previously received a final adjudication, or have been waived through failure to raise on appeal must also be determined. An issue is to be considered finally adjudicated if it has, at some point, received a full and fair hearing on the merits with no further opportunity for appeal, unless the Petitioner can show that the decision on the merits meets the high bar of the "clearly wrong" standard. W. Va. Code § 53-4A-1(b); *Smith v. Hedrick,* 181 W. Va. 394, 395 (1989). However, the West Virginia Supreme Court of Appeals has noted that a refused petition for appeal is not a final adjudication on the merits, and does not preclude future review of the issues therein raised. *Syl. Pt. 1, Smith v. Hedrick,* 181 W. Va. 394 (1989).

Any issue which could have been raised on appeal, but was not, is considered waived for the purposes of Habeas Corpus review, and the Petitioner bears the burden of rebutting the presumption that any Habeas ground waived was done so knowingly and intelligently. However, if Petitioner makes a prima facie case that he was denied either a fair trial or denial of a constitutional right, the Court is obligated to afford him the opportunity to offer proof to meet

this burden. *Losh v. McKenzie*, 166 W. Va. 762, 765 (1981). Grounds neither asserted nor expressly waived in Petitioner's petition are presumed waived. *Id.* at 770.

Because Petitioner's Petition for Direct Appeal was refused, his claims have not been subjected to a final adjudication, and will not be precluded on this basis. W. Va. Code § 53-4A-1(b); *Syl. Pt. 1, Smith v. Hedrick*, 181 W. Va. 394 (1989). However, this Court has determined, after review of the trial record, and memoranda of both parties, that the Petitioner is entitled to no relief. The Court will discuss the grounds for this denial in the following sections, as well as for its determination that no evidentiary hearing is necessary. The individual claims are numbered in the order they appear in Petitioner's brief.

I. Excessive Bail

Petitioner claims that the bail imposed, set at $25,000 per felony indictment, for a total of $50,000, was so high, and conditions thereon so unreasonable, as to become violative of both the Eighth Amendment to the U.S. Constitution's protections against the imposition of excessive bail, as well as of Article III, § 5 of the West Virginia Constitution, and as such merits reversal of his conviction. This claim should be denied because it has been waived, and still lacks merit had it not been, as the amount of bail imposed was within the Court's discretion, and the Petitioner was not prejudiced by its imposition.

Any claim which a Petitioner could have raised on direct appeal, but did not, is presumed intelligently and knowingly waived for purposes of Habeas Corpus review. *Ford v. Coiner*, 156 W. Va. 362, 367 (1972). The issue of excessive bail was not raised on appeal, and has therefore been waived. *Id.* The burden lies with the petitioner to rebut the presumption of intelligent and knowing waiver, and Petitioner's revised petition makes no attempt to address whether the

waiver was knowing and intelligent, and the Court must therefore treat the excessive bail issue as waived.

The admission of bail prior to trial is at the discretion of the trial court, which must consider two factors when determining bail: (1) Whether the evidence presented and the facts as to past conduct show that the accused is likely to appear for trial, and (2) whether the defendant is likely to commit other crimes while released on bail. *State ex rel. Ghiz v. Johnson*, 155 W. Va. 186, 183 (1971). As the trial court found, this Court finds that the Petitioner was both a significant failure to appear risk and a significant risk to commit other crimes while released on bail.

Petitioner's criminal history includes pleas and convictions for thirteen misdemeanors and one felony since 2005, including crimes of a violent nature such as two Domestic Battery offenses in 2005, and 1st Degree Robbery in 2008. In addition, Petitioner was at the time of his Breaking and Entering arrest already on probation for Battery and Petit Larceny convictions. *See* Finding of Fact ¶ 3. The Court finds that this history replete with criminal activity raised a strong possibility of the commission of more such offenses while awaiting trial. *State ex rel. Ghiz v. Johnson*, 155 W. Va. 186, 190 (1971).

Petitioner has previously failed to appear at a court proceeding, resulting in a Failure to Appear indictment in 2007, just two years prior to the Breaking and Entering conviction. With a recent Failure to Appear charge on record, the chance of another failure to do so was higher than for most defendants, and the trial court properly exercised its discretion. *Id.* at 190.

Furthermore, the Petitioner has failed to show any prejudicial outcome from his failure to make bail. Upon indictment for the instant offenses, his probation for Robbery and Petit Larceny

was revoked. Had Petitioner's bail been set lower, and had he met it, he would nonetheless have been incarcerated until trial, serving out the 1 year jail sentence imposed from the probation revocation.

In addition to having waived the bail issue through failure to raise it on appeal, Petitioner has failed to present any evidence that either the trial court abused its discretion in setting bail, or that he was prejudiced by the setting thereof. Petitioner is entitled to no relief, and this Court finds no need for an evidentiary hearing. W. Va. Code, § 4A-3(a) et seq.; *Perdue v. Coiner*, 156 W. Va. 467, 469 (1973).

II. Ineffective Counsel

Petitioner argues that the counsel of Mr. Barrat, his attorney during much of the pretrial period, was so deficient as to deprive him of his right to Art. III § 14 right to counsel. The Sixth Amendment to the U.S. Constitution, as well as Article III § 14 of the West Virginia Constitution, guarantee a right to counsel in criminal proceedings, which has been extended to cover not only representation, but competent and effective representation. *State ex rel. Strogen v. Trent*, 196 W. Va. 148, 152 (1996).

To assess the effectiveness of counsel, West Virginia courts have adopted a two-pronged test, established in *Strickland v. Washington*, and applied to state law in *State v. Miller*, consisting of (1) whether "counsel's performance was deficient under an objective standard of reasonableness," and (2) whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." The Court must also refrain from hindsight and second-guessing as to counsel's strategic decisions at trial. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *State v. Miller*, 194 W. Va. 3, 15

(1984). The burden lies with the Petitioner to overcome a substantial presumption of competence, as the Sixth Amendment is interpreted only to safeguard against a breakdown of the adversarial process, and not to "grade" the performance of counsel. 466 U.S. at 688. "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics, and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." *Syl. Pt. 21, State v. Thomas,* 157 W. Va. 640, 203 (1974). The Court need not address both prongs of the test, but may dispose of a claim based on a failure to prove either prong. *State ex rel. Daniel v. Legursky,* 195 W. Va. 314, 321 (1995).

The Petitioner's claim lacks merit, as even if counsel's failure to make the motions specified by Petitioner were outside the broad range of professionally acceptable conduct, it is unlikely that had counsel acted differently, the outcome of the proceedings would have changed. Petitioner makes several allegations as to how the performance of his counsel was ineffective.

(a) Excessive Bail

Petitioner's first contention under the Ineffective Counsel banner is that counsel's failure to raise the issue of bail reduction or modification in the form of a motion in either magistrate or circuit court was error sufficient to warrant an issuance of a Writ of Habeas Corpus. This claim lacks merit, as counsel requested a reduction of bail at during the pretrial hearing. While this request was not made in the form of a formal motion, Petitioner has proffered no evidence that his bail would probably have been lowered had counsel made such a motion, and Petitioner's contention fails the first prong of the *Strickland* test. *Syl. Pt. 1, State ex rel. Kitchen v. Painter,* 226 W. Va. 278 (2010); *Syl. Pt. 5, State v. Miller*, 194 W. Va. 3. Furthermore, even if the

Petitioner could prove not only that counsel's failure to make this motion was grossly unprofessional, but also that bail probably would have been lowered had the motion been made, Petitioner still would have been incarcerated for the duration of the trial, as his probation for a previous offense was revoked by the commission of the crime at issue in this case. Petitioner was not prejudiced by his counsel's performance at trial, and this claim lacks merit. *Syl. Pt. 1-4, State ex rel. Kitchen v. Painter*, 226 W. Va. 278 (2010).

(b) Speedy Trial

Petitioner's second contention is that counsel agreed to an order continuing the planned April 28, 2009 trial date, pushing the trial back into the following term. Petitioner alleges that through this inaction, counsel committed error that was outside the broad range of professionally assistive action, and that there was a substantial probability that, but for counsel's alleged unprofessional errors, the outcome of the proceeding would have been different. *Syl. Pt. 5, State v. Miller*, 194 W. Va. 3. This contention lacks merit.

Petitioner must first establish that his counsel at trial committed errors so grievous that it amounts to a total deprivation of the right to counsel. *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 325 (1995). Counsel's agreement to the continuance from April 28, 2009, allegedly against the wishes of the Petitioner, occurred in concert with another continuance by Petitioner, awaiting additional evidence. *See* Finding of Fact ¶ 7. Petitioner's counsel, on May 1st, 2012, once again requested continuance to prepare for trial. *See* Finding of Fact ¶ 8. The Court found that, against the protests of Petitioner, the extra time to prepare for trial was necessary. The Court's finding of necessity in delaying trial demonstrates that a competent attorney in fact would have agreed to continue trial, and Petitioner's claim does not establish the element of

unprofessional error, and does not allege that the outcome of his trial would have been different in the absence of counsel's conduct, and must be denied. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *State v. Miller*, 194 W. Va. 3, 15 (1984).

(c) Prejudicial Joinder

Petitioner's final claim under ineffective assistance of counsel is that trial counsel failed to file a motion for severance or relief from prejudicial joinder. This contention does not amount to ineffective assistance under the test standard. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *State v. Miller*, 194 W. Va. 3, 15 (1984).

Beyond unsupported claims, Petitioner has not provided any specific allegation or evidence that being tried jointly with Mr. Price prejudiced him at trial. He has noted that counsel did not move for severance, but proffers no evidence that this was in any way outside the boundaries of professionally assistive conduct. Petitioner's claim has also failed to meet the second prong of the test, failing to provide evidence that, absent counsel's decision not to move for severance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *State v. Miller*, 194 W. Va. 3, 15 (1984). Had the defendants been severed, Petitioner's trial likely still would have been continued until August, due to his own change in counsel, and instant counsel's need for more time to prepare for trial. *See* Finding of Fact ¶ 4 and ¶ 8. Petitioner has demonstrated no prejudice due to ineffective counsel on this point, and is entitled to no relief based on this claim, and the Court finds no need for an evidentiary hearing. *Syl. Pt. 1-4, State ex rel. Kitchen v. Painter*, 226 W. Va. 278 (2010).

The Court finds each of Petitioner's assertions under the banner of ineffective assistance of counsel without merit. In addition, Petitioner has failed to show any prejudicial cumulative

effect of these allegations. Even if the cumulative effect of all three allegations were to have an impact on the outcome of the proceedings, Petitioner has failed to demonstrate that Mr. Barrat acted unreasonably in any of his decisions made at trial. For these reasons, the Court finds no prejudicial effect, of any individual contention or all contentions cumulatively. The Petitioner is entitled to no relief, and the Court sees no need for an evidentiary hearing. W. Va. Code, § 4A-3(a) et seq.; *Perdue v. Coiner*, 156 W. Va. 467, 469 (1973).

III. Right to a Speedy Trial

In the State of West Virginia, a speedy trial is prescribed by statute as occurring within one court term of a defendant's indictment. W. Va. Code § 62-3-1. Petitioner claims that, because his trial was continued into the following term through his, as well as his co-defendant's, change of counsel, that he is entitled to Habeas Corpus relief on the basis of denial of speedy trial. This claim must be denied, as it has been waived through failure to assert this ground on appeal, and lacks merit.

Any claim which a Petitioner could have raised on direct appeal, but did not, is presumed intelligently and knowingly waived for purposes of Habeas Corpus review. *Ford v. Coiner*, 156 W. Va. 362, 367 (1972). The issue of denial of speedy trial was not raised on appeal, and must therefore be denied on the grounds of waiver. *Id.*

Even in the absence of waiver, Petitioner is entitled to no relief on the basis of a speedy trial denial. While W. Va. Code § 62-3-1 prescribes a trial to occur within one court term, a Petition for Writ of Habeas Corpus must be based in a denial of a constitutional right. *Syl. Pt. 4, State ex rel. McMannis v. Mohn*, 163 W. Va. 129 (1979). Even if the trial court had acted in error in delaying Petitioner's trial, it is not an error of constitutional caliber, and is not subject to

Habeas Corpus review. *Id.* W. Va. Const. Art. III, § 14 and W. Va. Code § 62-3-21 guarantee a trial to occur within three terms of the court. Petitioner was indicted in February of 2009, and trial occurred in August of 2009, well within the constitutionally guaranteed three terms. *See* Procedural History ¶ 1 and ¶ 4.

Thus, the Court finds this claim to be without merit. Petitioner has alleged no denial of his constitutional right to a speedy trial. He is entitled to no relief on this ground, and this Court finds no need for an evidentiary hearing. W. Va. Code § 53-4A-3(a) et seq.; *Perdue v. Coiner*, 156 W. Va. 467, 469 (1973).

IV. Prejudicial Joinder

In West Virginia, severance of trials of co-defendants is at the discretion of the trial court upon showing of prejudice to either defendant, or to the state. *W.V.R.Cr.P* 14(b). Petitioner claims that he was unduly prejudiced by the joining of his indictment with that of Mr. Price, claiming the delay in trial incident to Mr. Price's change of counsel deprived him of his right to speedy trial. *See* Procedural History ¶ 1 and ¶ 3. This claim must be denied, as it has been waived and it lacks merit, as Petitioner was not deprived of his right to speedy trial. *See* III. Right to a Speedy Trial.

Any claim which a Petitioner could have raised on direct appeal, but did not, is presumed intelligently and knowingly waived for purposes of Habeas Corpus review. *Ford v. Coiner*, 156 W. Va. 362, 367 (1972). The issue of Prejudicial Joinder was not raised on appeal, and must therefore be denied on the grounds of waiver. *Id.*

In addition, Petitioner's claim as to prejudicial joinder of defendants lacks merit, and must be denied. To assert a claim for Habeas Corpus review under prejudicial joinder, Petitioner must

show that he at least appears to have been denied a right, and it must have been due to being tried jointly with Mr. Price. *W.Va.R.Cr.P.* 14(b). Petitioner's claim is supported neither legally nor factually. He has not alleged either that he moved for severance in the course of the trial, or that the outcome of his trial would have been different had he been tried separately from his co-defendant. His only allegation to this effect is that his co-defendant's change of counsel delayed his trial from April, 2009 until August, 2009. This assertion lacks legal foundation, as Petitioner was not deprived of his speedy trial rights, *See* III. Right to a Speedy Trial, and is patently false, as Petitioner also requested continuance due to his own change in counsel. *See* Procedural History ¶ 4. Petitioner therefore would have been subject to the same self-initiated delay had he been tried individually.

The Court finds this claim without merit. Petitioner waived this right by failing to raise it on appeal, and has failed to demonstrate any prejudice due to the joinder of his trial with that of his co-defendant. Petitioner is entitled to no relief on this ground, and the Court finds no need for an evidentiary hearing. W. Va. Code § 53-4A-3(a) et seq.; *Perdue v. Coiner*, 156 W. Va. 467, 469 (1973).

V. Denial of Peremptory Strikes

Petitioner contends that the Court's allocation of peremptory strikes, three to each defendant and two to the state, rather than six to each defendant, constituted prejudicial error sufficient to entitle him to relief. The West Virginia Supreme Court of Appeals has yet to definitively review the issue of peremptory strike allocation. However, W. Va. Code § 62-3-8 provides that:

> Persons indicted and tried jointly, for a felony, shall be allowed to strike from the panel of jurors not more than six thereof, and only such as they all agree upon shall be stricken therefrom; and if they cannot agree upon the names to be so stricken off, the

> prosecuting attorney shall strike therefrom a sufficient number of names to reduce the panel to twelve. If persons jointly indicted elect to be, or are, tried separately, the panel in the case of each shall be made up as provided in the third section [§ 62-3-3] of this article.

The issue of Denial of Peremptory Strikes was raised on direct appeal, which the West Virginia Supreme Court of Appeals refused. In order to prevail, Petitioner must show that the ruling on this issue during trial was "clearly wrong." W. Va. Code § 54-4A-1(b). Petitioner's allegations regarding peremptory strikes are based on an alleged ambiguity of wording, in which he claims the language of the statute could be construed to mean that each co-defendant is entitled to six peremptory strikes during the voir dire process. However, the statute reads "Persons indicted and tried jointly, for a felony, shall be allowed to strike from the panel of jurors *not more than six thereof*, and only such as they all agree upon shall be stricken therefrom" (emphasis added). W. Va. Code § 62-3-8. Nothing in this language suggests that the statute grants six strikes *each*. A slight possibility of statutory misinterpretation hardly meets the demands of a "clearly wrong" standard, and the West Virginia Supreme Court of Appeals clearly agreed when they refused Petitioner's Petition for Direct Appeal.

Petitioner has failed to provide evidence that the sharing of six peremptory strikes between co-defendants constituted a "clearly wrong" ruling, and the Petitioner is entitled to no relief on this ground. W. Va. Code 53-4A-1(b); *Perdue v. Coiner*, 156 W. Va. 467, 469 (1973).

Petitioner further alleges that the Court's failure to exercise its discretion to grant additional peremptory strikes to the defendants, as provided for in Rule 24(b)(2) of the West Virginia Rules of Criminal Procedure, constitutes reversible error. Rule 24(b)(2) states that:

> (A) For good cause shown, the court may grant such additional challenges as it, in its discretion, believes necessary and proper."

(B) If there is more than one defendant, the court may allow the parties additional challenges and permit them to be exercised separately or jointly."

(C) Time for making motion.– A motion for relief under subdivision (b)(2) of this rule shall be filed at least one week in advance of the first scheduled trial date or within such other time as may be ordered by the circuit court.

W.Va.R.Cr.P 24(b)(2).

As noted above, Rule 24(b)(2) provides that the procedure for requesting additional peremptory strikes is to file a motion more than one week in advance of the scheduled trial date. Neither co-defendant filed such a motion at any point during the trial. Even in the absence of a motion, the issue of additional peremptory strikes was discussed at trial, and the Court found, in its discretion, citing the nature of the offenses, which "pale in comparison to a number of [other felonies before the Court] considering the significance of the charges," that good cause was not shown. *See* Finding of Fact ¶ 9. In the case of a decision that is within the Court's express discretion to grant "for good cause shown," it is difficult to find that its ruling is "clearly wrong."

The Court finds this claim to be without merit. Petitioner has failed to show that the trial court's decision to allot six peremptory strikes between the two defendants was "clearly wrong." Petitioner is not entitled to relief on this ground, and the Court finds no need for an evidentiary hearing. W. Va. Code § 53-4A-3(a) et seq.; *Perdue v. Coiner*, 156 W. Va. 467, 469 (1973).

VI. Jury Instructions

The Court may "summarily deny unsupported claims that are randomly selected from a list of grounds." *Losh v. McKenzie*, 166 W. Va. 762, 771 (1981). Petitioner asserts this claim at the beginning of his petition as part of an enumerated list of assertions, and again when it appears on his *Losh* list, but makes no further argument as to why this assertion should warrant a grant of relief. Lacking factual or legal support, Petitioner's claim as to jury instructions is SUMMARILY DENIED.

VII. Excessive Sentence

Petitioner claims that his sentence was so disproportionate to the nature of his crime that it "shocks the conscience and offends fundamental notions of human dignity." This contention lacks merit. Article III, § 5 of the West Virginia Constitution guarantees that "Penalties shall be proportional to the character and degree of the offence." Sentences which fall within the statutory limits for the crimes of which a defendant is convicted are not subject to review, so long as they are not based on an impermissible factor. *State v. Goodnight*, 169 W. Va. 366, 366 (1982).

The sentence imposed on Petitioner, 1-10 years for Breaking and Entering, 1-5 years for Conspiracy, and 1 year for Petit Larceny to run consecutively, though the maximum prescribed for the crimes of which he was convicted, still fall within the statutory limits, and are thus not subject to review, unless based on an impermissible factor. In response, Petitioner claims that it is his homeless status that influenced the imposition of the maximum sentence. However, Petitioner proffers no evidence as to the trial court's motivations, other that the presence of both factors. In fact, in the Sentencing Order, the trial court stated their reason for imposing the maximum sentence was due to a concern for the public over Petitioner's lengthy criminal history. The trial court properly used its discretion in imposing the maximum sentences.

Ordering that Petitioner's sentences should run consecutively was a proper exercise of the trial court's discretion. W. Va. Code § 61-11-21 provides that two separate sentences will run consecutively, unless the sentencing court states otherwise. Reinforcing the state code, the West Virginia Supreme Court of Appeals has repeatedly held that "When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, trial court may, in its

discretion, provide that sentences run concurrently, and unless court does so provide, sentences will run consecutively." *State v. Allen*, 208 W. Va. 144, 153 (1999); *Syl. Pt. 7, State ex rel. Farmer v. McBride*, 224 W. Va. 469 (2009).

Within the above-stated guidelines, the sentencing court's discretion is broad, an idea which is reinforced by the refusal of the Supreme Court of Appeals to review this element of Petitioner's claim. *State ex rel. Massey v. Hun*, 197 W. Va. 729, (1996). The sentence imposed at trial falls within the non-reviewable domain of the sentencing court's discretion. Petitioner is entitled to no relief, and the Court finds no need for an evidentiary hearing. W. Va. Code § 53-4A-3(a) et seq.; *Perdue v. Coiner,* 156 W. Va. 467, 469 (1973).

Grounds Expressly Waived

Petitioner submitted a Checklist of Potential Grounds for Habeas Corpus Relief, which enumerates the potential grounds for issuance of Writ of Habeas Corpus, as listed in *Losh v. McKenzie*, in which Petitioner indicates which grounds he expressly waives, and which he asserts in his Revised Petition. Petitioner, by initialing the "Waived" column next to the corresponding ground, has explicitly WAIVED any claim on the following grounds: (1) trial court lacked jurisdiction, (2) statute under which conviction obtained is unconstitutional, (3) indictment shows on face no offense was committed, (4) prejudicial pretrial publicity, (6) involuntary guilty plea, (7) mental competency at time of crime, (8) mental competency at time of trial cognizable even if asserted at proper time or if resolution, (9) incapacity to stand trial due to drug use, (10) language barrier to understanding the proceedings, (11) denial of counsel, (12) unintelligent waiver of counsel, (13) failure of counsel to take an appeal, (14) consecutive sentences for same transaction, (15) coerced confessions, (16) suppression of helpful evidence by

prosecutor, (17) state's knowing use of perjured testimony, (18) falsification of transcript by prosecutor, (19) unfulfilled plea bargains, (20) information in presentence report erroneous, (22) double jeopardy, (23) irregularities in arrest, (25) no preliminary hearing, (26) illegal detention prior to arraignment, (27) irregularities or errors in arraignment, (28) challenges to the composition of the grand jury or its procedures, (29) failure to provide copy of indictment to defendant, (30) defects in indictment, (31) improper venue, (32) pre-indictment delay, (33) refusal of continuance, (34) refusal to subpoena witnesses, (36) lack of full public hearing, (37) nondisclosure of grand jury minutes, (38) refusal to turn over witness notes after witness has testified, (39) claim of incompetence at time of offense, as opposed to time of trial, (40) claims concerning use of informers to convict, (41) constitutional errors in evidentiary rulings, (43) claims of prejudicial statements by trial judges, (44) claims of prejudicial statements by prosecutor, (45) sufficiency of evidence, (46) acquittal of co-defendant on same charge, (47) defendant's absence from part of proceedings, (48) improper communications between prosecutor or witnesses and jury, (49) question of actual guilt upon an acceptable guilty plea, (50) severer sentence than expected, (52) mistaken advice of counsel as to parole or probation eligibility, (53) amount of time served on sentence; credit for time served.

Accordingly, for the reasons herein noted, the Court DENIES Petitioner's Revised Petition for Post-Conviction Habeas Corpus Relief. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

Therefore it is hereby ADJUDED and ORDERED that this Court finds no need for a hearing in this matter, and the Petitioner Matthew A. Hardesty's Revised Petition for Writ of Habeas Corpus is DENIED.

The Court directs the Circuit Clerk to distribute attested copies of this order to the following counsels of record:

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CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: _____
Deputy Clerk