STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Brandon L. Johnson,
Petitioner Below, Petitioner

FILED
July 8, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 12-1097 (Ohio County 12-C-170)

Marvin Plumley, Warden, Huttonsville Correctional Center,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Brandon L. Johnson, *pro se*, appeals the order of the Circuit Court of Ohio County, entered August 28, 2012, denying his petition for a writ of habeas corpus. The respondent warden, by counsel Andrew D. Mendelson, filed a summary response and a motion to dismiss. Petitioner filed a response to the motion to dismiss and a motion to file a supplemental appendix.[1]

The 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 was sixteen years of age at the time the alleged crime was committed. Petitioner was transferred to adult status subsequent to a December 11, 2001 transfer hearing.[2] On April 4, 2002, a jury found petitioner guilty of aggravated robbery. Petitioner was subsequently sentenced to forty-eight years in prison.[3]

In finding petitioner guilty of aggravated robbery, the jury answered a special interrogatory

[1] In the motion to dismiss, the respondent warden argues that the appeal should be dismissed because petitioner's appendix is inadequate to allow a meaningful review of his assignments of error. In his supplemental appendix, petitioner supplies the transcripts that the respondent warden stated were missing. This Court denies the motion to dismiss and grants the motion to file a supplemental appendix. Petitioner's supplemental appendix is ordered filed.

[2] Petitioner did not appeal his transfer to adult status.

[3] Before his eighteenth birthday, petitioner served his sentence at the West Virginia Industrial Home for Youth.

that "beyond a reasonable doubt[,] . . . [petitioner] used, presented[,] and/or brandished a firearm during the commission of a crime."[4] The jury's answer to the special interrogatory is consistent with this Court's recitation of the facts in petitioner's direct appeal:

> On July 13, 2001, [the victim] was driving through a residential area of Wheeling, West Virginia. He testified that he stopped his vehicle at the behest of two young African-American males. He further testified that [petitioner] then approached the vehicle and entered the passenger side and requested money. [Petitioner] thereafter allegedly picked up the victim's paycheck from the car and pulled back his jacket to reveal a silver automatic pistol in the waistband of his pants. The other assailant then asked for additional money and pointed a revolver at [the victim]. [The victim] refused to provide more money and then drove away. As he left the scene of this incident, either [petitioner] or his accomplice shot at [the victim]'s car. Two bullets hit [the victim], injuring his shoulder and thigh.

State v. Johnson, 213 W.Va. 612, 613-14, 584 S.E.2d 468, 469-70 (2003). In affirming petitioner's conviction and sentence, this Court determined that it would be premature to evaluate petitioner's claims of disproportionality and excessiveness of sentence when the circuit court intended to reevaluate petitioner's sentence once he reached the age of eighteen. *Id.*, , 213 W.Va. at 616, 584 S.E.2d at 472.

Specifically, the circuit court stated that "another hearing would be held subsequent to [petitioner]'s eighteenth birthday for the purpose of 'possible reconsideration or modification of [petitioner]'s sentence based on all reasonable records available since [petitioner]'s conviction.'" *Id.*; *see* W.Va. Code § 49-5-16(b). The circuit court conducted a hearing to consider modifying petitioner's sentence on April 22, 2003.

At the April 22, 2003, hearing, neither party called witnesses, but each presented arguments to the circuit court. In its arguments, the State noted petitioner's failure to modify his behavior and "non-compliance since his placement at the West Virginia Industrial Home for Youth." Based upon a thorough review of petitioner's progress reports "as well as the psychological evaluation provided to it by [the] facility," the circuit court concluded that "the relevant information relating to [petitioner]'s placement at the Industrial Home for Youth reinforces the original sentence." The circuit court ordered that petitioner's sentence of forty-eight years remained in effect and ordered his transfer to the adult prison system on April 25, 2003, his eighteenth birthday.

[4] The jury was instructed to answer the special interrogatory "only if you find [petitioner] guilty of the felony offense of robbery in the first degree as [a] principal in the first degree and not as an aider and abettor."

Subsequently, on May 7, 2012, petitioner filed a petition for a writ of habeas corpus.[5] Petitioner alleged the following grounds for relief: (1) the circuit court lessened the State's burden of proof by giving a confusing instruction when instructing the jury on the theory that petitioner was an aider and abettor; (2) counsel was ineffective in not impeaching the victim with his prior inconsistent statements; (3) there was insufficient evidence to convict petitioner; (4) counsel was ineffective in not offering an instruction on the lesser included offence of larceny; and (5) counsel was ineffective in not obtaining a complete trial transcript.

In an order entered August 28, 2012, the circuit court denied the petition. The circuit court determined that the petition was "meritless" and that based on the record, petitioner failed to meet his burden of proof.

We review a circuit court's order denying a habeas petition 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.

Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

On appeal, petitioner reiterates the first four grounds found in his petition and argues that the circuit court abused its discretion in denying the petition.[6] The respondent warden argues that the circuit court did not abuse its discretion in denying the petition without a hearing and without appointment of counsel.

Petitioner's first ground is that the circuit court gave a confusing aiding and abetting instruction that lessened the State's burden of proof. However, by answering the special interrogatory, the jury found petitioner "guilty of the felony offense of robbery in the first degree as [a] principal in the first degree *and not as an aider and abettor*." (emphasis added). Because the jury did not find petitioner guilty on the aiding and abetting theory, any error in instructing on that

[5] Petitioner filed two previous petitions which were denied without a hearing and without appointment of counsel.

[6] Petitioner also raises the issue of his sentence on appeal; however, he did not present the issue to the circuit court. "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2, *Sands v. Security Trust Company*, 143 W.Va. 522, 102 S.E.2d 733 (1958). Even if the issue is considered, the circuit court did what it stated it was going to do: the circuit court held a hearing to consider modifying petitioner's sentence. The circuit court determined that petitioner's record at the West Virginia Industrial Home for Youth did not warrant any modification.

issue was harmless beyond a reasonable doubt. *See* Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975) ("Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.").

Petitioner's second ground is that counsel should have impeached the victim with his prior inconsistent statements. This Court has reviewed the statements and the relevant portions of the trial transcript. The victim's pretrial statements and his trial testimony do not match each other word for word, but they are not inconsistent. Counsel did question the victim to clarify whether the other assailant was on the driver's side of his vehicle or on the passenger's side where petitioner was. In addition, on cross-examination, the victim testified, as he did on direct and redirect examination, that petitioner had a gun. After careful consideration, this Court finds that this ground is insufficient to entitle petitioner to relief. *See* Syl. Pt. 1, *State ex rel. Scott v. Boles*, 150 W.Va. 453, 147 S.E.2d 486 (1966) (holding that a habeas petitioner has the burden of proving that the allegations in his petition would warrant his release.),

Petitioner's third ground is that the evidence was insufficient to convict him of aggravated robbery. After reviewing the relevant portions of trial transcript, and considering both the jury's finding of guilt and its answer to the special interrogatory, petitioner cannot meet his "heavy burden" of showing that his conviction is unsupported. *See* Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). The victim's testimony alone was sufficient to establish all the elements of this crime.

Finally, in light of the jury's answer to the special interrogatory, even if counsel offered an instruction on the lesser included offence of larceny, this Court finds that the outcome of petitioner's trial would have not been different.[7]

Because none of petitioner's grounds for relief has merit, the circuit court was under no obligation to hold a hearing or appoint counsel. *See* Syl. Pt. 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973). After careful consideration, this Court concludes that the circuit court did not abuse its discretion in denying the petition.

For the foregoing reasons, we affirm.

Affirmed.

[7] 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 (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. *See* Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

ISSUED: July 8, 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