

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

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

**vs) No. 13-0283** (Pocahontas County 09-C-07)

**Davie Lee Hurt,  
Petitioner Below, Respondent**

**FILED**

May 30, 2014

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

**MEMORANDUM DECISION**

Petitioner David Ballard, Warden, by counsel Laura Young and Marland Turner, appeals an order of the Circuit Court of Pocahontas County entered February 21, 2013, which granted Respondent Davie Lee Hurt's petition for writ of habeas corpus. Respondent, by counsel Crystal Walden, filed a response to which petitioner filed a reply.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Respondent was tried and convicted by a jury of first-degree murder on May 29, 1998, in connection with the robbery and shooting death of Freddie Lester at the gas station and convenience store where he worked in Bluefield, Mercer County, West Virginia.<sup>1</sup> The evidence upon which respondent was convicted is set forth in great detail in the circuit court's order granting respondent's request for habeas relief. Respondent was sentenced to life in prison with a recommendation of mercy. Respondent's post-trial motions for arrest of judgment and a new trial were denied, and his direct appeal was refused by this Court by order entered June 3, 1999.

Respondent filed a *pro se* habeas petition on September 14, 1999, which was denied on November 18, 1999. An amended habeas petition was subsequently filed (by newly appointed counsel) based upon the fact that respondent's co-defendant recanted his trial testimony implicating respondent in the crime. The amended habeas petition was denied by the circuit court.

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<sup>1</sup>At the end of respondent's first trial, which was held in Mercer County (where Mr. Lester's death occurred), the jury voted ten to two to acquit. As a result of the hung jury, the trial court declared a mistrial. Respondent's trial counsel subsequently moved for and was granted a change of venue due to the publicity attendant to the first trial. Venue was transferred to Pocahontas County.

A second habeas petition was filed in November of 2008 alleging that newly discovered evidence supported respondent's innocence<sup>2</sup> and further alleging ineffective assistance of previous habeas counsel. By order entered June 10, 2010, the habeas court applied the two-pronged test set forth in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995),<sup>3</sup> and concluded that respondent's previous habeas counsel was ineffective. Accordingly, the habeas court ordered that respondent be afforded a new opportunity to present a habeas petition and that grounds raised in the prior habeas matter would not be barred by *res judicata*. An omnibus evidentiary hearing was held on April 15, 2011. By order entered April 18, 2011, the habeas court granted petitioner's request for habeas relief and vacated his conviction.

The State of West Virginia appealed the April 18, 2011, order granting habeas relief. This Court reversed and remanded, concluding, in relevant part, that the habeas court committed error in failing to make specific findings of fact and conclusions of law relating to its finding of ineffective assistance of counsel. *Ballard v. Hurt*, 230 W.Va. 374, 380, 738 S.E.2d 538, 545 (2012). After remand, the habeas court entered a thirty-two page order on February 21, 2013, with extensive findings and conclusions in support of its ruling granting habeas relief. This appeal followed.

This Court reviews appeals of circuit court orders granting 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

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<sup>2</sup>The newly discovered evidence of respondent's innocence consisted of statements by Barney and Marsha Wheeler, the parents of respondent's girlfriend, Ginger Wheeler. According to Mr. and Mrs. Wheeler, who had never before been interviewed in connection with the case, respondent was on the telephone with their daughter for a four-hour period spanning the night/morning of Mr. Lester's murder, including the time the crime transpired. Respondent argued that the Wheelers' version of events corroborated his co-defendant's recantation of his prior claim that respondent was involved in Mr. Lester's murder.

<sup>3</sup>In syllabus point 5 of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), this Court held as follows:

In 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.

*See* Syl. Pt. 3, *Ballard v. Ferguson*, 232 W.Va. 196, 751 S.E.2d 716 (2013).

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). *See also Ballard v. Ferguson*, 232 W.Va. 196, \_\_\_, 751 S.E.2d 716, 719 (2013) (“Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” (quoting Syl. Pt. 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975))).

On appeal, petitioner argues that the habeas court erred in finding that trial counsel was ineffective for failing to investigate respondent’s alibi; failing to secure the attendance of a witness; failing to object to “non-disclosed” State witnesses; seeking a change in venue and then failing to object to the new venue; conducting a “haphazard” *voir dire*; and failing to object to the prosecutor’s remarks in closing.

Having carefully reviewed the habeas court’s order, this Court concludes that the habeas court did not abuse its discretion in granting respondent’s request for habeas corpus relief. The habeas court carefully addressed respondent’s claims that his trial counsel was ineffective. More specifically, the habeas court’s very detailed order supports its conclusion that trial counsel was ineffective for failing to investigate respondent’s alibi that he was not present at the crime scene when Mr. Lester was shot by respondent’s co-defendant but, rather, was at home talking with his girlfriend on the telephone. The habeas court made specific reference to the fact that trial counsel failed to interview the girlfriend’s parents even though respondent requested that he do so, and further failed to subpoena telephone records in an effort to corroborate respondent’s alibi in this regard. The habeas court observed that respondent’s alibi should have been investigated and efforts to corroborate it should have been made, especially given the fact that respondent’s co-defendant recanted his initial testimony implicating respondent and then later changed course again, claiming that respondent was, in fact, present during the murder of Mr. Lester. This Court cannot conclude that the habeas court abused its discretion in concluding that trial counsel was ineffective under the two-pronged test in *Miller*.

Likewise, the habeas court did not abuse its discretion in concluding that trial counsel was ineffective for failing to subpoena all witnesses necessary for an adequate defense. In particular, the habeas court found that trial counsel failed to secure the attendance of a key witness.<sup>4</sup> Although the witness previously testified in respondent’s first trial, the trial court refused to permit his testimony to be read during the retrial. In its February 21, 2013, order, the habeas court explained, in detail, that trial counsel’s failure to secure a necessary witness was deficient under the two pronged test set forth in *Miller*. The habeas court did not abuse its discretion in finding that trial counsel was ineffective in this regard.

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<sup>4</sup>Trial counsel failed to review the return of service and, therefore, was unaware that the witness was not properly served with a subpoena because the witness had moved out of state and no longer lived at the home where service was attempted.

Finally, the habeas court determined that trial counsel was ineffective for failing to object to testimony from two witnesses for the State who were not timely disclosed; requesting a change of venue even though respondent was nearly acquitted in his first trial in Mercer County; failing to object to Pocahontas County as the new venue given that that county is “virtually devoid of African American citizens[;]”<sup>5</sup> failing to inquire, during *voir dire*, if any member of the all-white jury panel was affiliated with The National Alliance, a locally-based white supremacist organization, or any other similar group; and failing to object to closing remarks by the State that characterized respondent as a “drug dealer,” a misleading and prejudicial statement that was based on evidence expressly *excluded* by the trial court. The habeas court’s in-depth discussion and legal analysis supporting its conclusion that, under *Miller*, trial counsel was deficient in all of these respects was not an abuse of discretion and will not be disturbed on appeal.

Given that the habeas court’s order includes extensive and well-reasoned findings and conclusions as to all of the assignments of error raised herein and our conclusion that the habeas court’s order and the record before us reflect no clear error or abuse of discretion, we hereby adopt and incorporate the habeas court’s findings and conclusions and direct the Clerk to attach a copy of the habeas court’s February 21, 2013, order granting respondent’s petition for writ of habeas corpus to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** May 30, 2014

**CONCURRED IN BY:**

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

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<sup>5</sup>Respondent is African American.