STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Henry Keith Wykle,
Petitioner Below, Petitioner

vs) **No. 13-0621** (Fayette County 06-C-274)

David Ballard, Warden, Mount Olive Correctional Complex,
Respondent Below, Respondent

FILED
February 18, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Henry Keith Wykle's appeal, filed by counsel Thomas A. Rist, arises from the Circuit Court of Fayette County, which denied petitioner post-conviction habeas corpus relief by order entered on May 16, 2013. Respondent David Ballard, Warden, by counsel Benjamin F. Yancey III, filed a response. On appeal, petitioner argues that the circuit court erred in failing to find that petitioner received ineffective assistance of counsel at his plea hearing.

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.

In 1993, petitioner was indicted on one count of first degree murder and one count of first degree sexual assault. Following a plea agreement with the State, petitioner pled guilty to first degree murder. The plea agreement provided that the State would dismiss the sexual assault charge and recommend mercy at petitioner's sentencing. At sentencing, the circuit court ordered petitioner to serve life in prison without mercy. Petitioner first filed for post-conviction habeas corpus relief in 1997, which the circuit court denied and this Court refused on appeal.

In July of 2006, petitioner filed the instant petition for habeas corpus relief and argued that certain serology evidence warranted review in light of *In re Renewed Investigation of the State Police Crime Lab., Serology Div.*, 219 W.Va. 408, 633 S.E.2d 762 (2006). Petitioner argued that he was not provided with the serology test results in his criminal proceedings below and that, had he known of these results, he would not have pled guilty to first degree murder. The circuit court denied relief and, on appeal, this Court reversed and remanded to the circuit court for an evidentiary hearing on the serology test results. In February of 2013, the circuit court held a hearing on this matter and, subsequently, denied petitioner habeas corpus relief. From this order, petitioner now appeals.

This Court reviews appeals of circuit court orders denying 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 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).

Petitioner's argument on appeal is that his trial counsel was ineffective because he did not provide the serology test results to him prior to his plea. Petitioner reiterates his argument below that, had he known of these results, he would not have pled guilty.

Upon our review of the record and the briefs on appeal, we find that the circuit court did not abuse its discretion in not finding petitioner's trial counsel to have been ineffective. In so finding, we bear in mind the following:

> 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 (1995). Moreover, "'[o]ne who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence.' Syllabus, Point 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)." Syl. Pt. 2, *Carrico v. Griffith*, 165 W.Va. 812, 272 S.E.2d 235 (1980). Petitioner has not met his burden in showing that there would be a reasonable probability that, but for his trial counsel's alleged error in not providing the serology test results, the result of his criminal proceedings would have been different. He asserts that any criminal defendant should be provided all discovery prior to evaluating pleading guilty, but fails to discuss how this information would have changed petitioner's case. The circuit court's order reflects its thorough analysis of petitioner's same argument presented in circuit court. Having reviewed the circuit court's "Order" entered on May 16, 2013, 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 order to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 18, 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

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

HENRY KEITH WYKLE,

Petitioner,

vs. Civil Action No. 06-C-274-H

DAVID BALLARD, Warden, formerly
THOMAS L. MCBRIDE,
Mount Olive Correctional Complex,

Respondent.

ORDER

On February 13, 2013, a habeas corpus hearing was conducted in the above-styled matter. Appearing was the Inmate Petitioner, his court appointed counsel, Thomas Rist, and Carl Harris, Fayette County Prosecuting Attorney, counsel for the Respondent.

At the conclusion of the hearing, the Court directed counsel to present their proposed findings of fact and conclusions of law within forty-five (45) days. Both counsel timely submitted same.

Upon considering the arguments of the parties, the aforementioned proposed findings of fact and conclusions of law, the entire contents of the court file, the contents of the underlying criminal court file, a prior habeas corpus file, and all relevant law, the Court announces the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The undersigned Judge presided over the underlying criminal case which gives rise to the Petition in the case sub judice, as well as the Inmate Petitioner's prior habeas corpus case which was previously resolved.

2. The Inmate Petitioner was charged in a two count indictment with the felony crimes of murder and first degree sexual assault. The Indictment was assigned number 93-F-205

3. A plea hearing was conducted on March 26, 1993. Appearing at said hearing was the Prosecuting Attorney (now the other Fayette County Circuit Court Judge), the Inmate Petitioner, and his counsel, the late Steve Vickers. The terms of the plea agreement were orally announced on the record as follows:

> The State: The plea agreement that has been reached in this matter is that the defendant, Henry Keith Wykle, regarding Indictment 93-F-25, would be permitted to enter a plea of guilty to murder in the first degree, as charged in Count 1 of that

indictment. Upon acceptance of that guilty plea, the State recommends, as part of the plea agreement, mercy to this particular defendant.

Also, upon the acceptance of that plea by the Court, Count 2 of the indictment, charging first-degree sexual assault would be dismissed and nollied (sic) by the Court.

It is clearly understood by Mr. Vickers and his client that the recommendation of mercy that the State has added to its plea agreement is in no way binding upon this Court, and this Court will decide in its sole discretion as to whether or not that recommendation be added to the sentence which will be imposed upon the defendant in this matter.

The Court: Mr. Vickers, is that the plea agreement that your client has with the State of West Virginia in this case?

Mr. Vickers: It is, Your Honor.

Plea, March 26, 1993, p. 4-5.

4. The Inmate Petitioner was administered an oath and then answered questions posed by the Court at the aforementioned plea hearing prior to entering a plea of guilty to first degree murder, a felony. The plea was entered pursuant to Kennedy v. Frazier, 178 W.Va. 10, 357 S.E.2d 43 (1987).

5. At the aforementioned plea hearing, and as a part thereof, the Inmate Petitioner signed a written Plea of Guilty to the felony crime of first degree murder. Said document represented that the Inmate Petitioner understood that "any plea bargaining which appears in the record of this case is not binding upon the Court with respect to punishment or probation." Further, said document contained language whereby the Inmate Petitioner acknowledged that he had been represented in his case by Mr. Vickers to his "complete and total satisfaction." An Order was entered April 09, 1993, memorializing the aforementioned proceeding.

6. A sentencing hearing was conducted April 09, 1993. At said hearing testimony was offered on behalf of the Inmate Petitioner. The Court then asked the Inmate Petitioner, "Mr. Wykle, do you have anything to say, sir?" The Inmate Petitioner replied, "No, sir." Sentencing, August 12, 1994, p. 20. After considering said testimony, the State's recommendation, and all other evidence, the Court concluded that a recommendation of mercy should not be a part of to the Inmate Petitioner's sentence. Thus, the Inmate Petitioner was sentenced to the West Virginia penitentiary for life, without any recommendation of mercy, for the felony crime of first degree murder. An Order was entered April 22, 1993, memorializing the aforementioned proceeding.

7. On October 24, 1997, the Court appointed Graydon C. Ooten, Jr., then an attorney practicing criminal law, to represent the Inmate Petitioner in his pursuit of post-conviction relief.

8. On December 11, 1997, a Petition for Writ of Habeas Corpus, was, by counsel, filed thus instituting Civil Action No. 97-C-424-H. An Amended Petition was filed, by counsel, on June 24 1998.

9. A "Losh List" of grounds for relief raised and waived, pursuant to Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981), was completed and signed by the Inmate Petitioner and his counsel and filed on October 1, 1998. The Inmate Petitioner then raised the following grounds for post-conviction relief: an involuntary guilty plea, coerced confession, ineffective assistant of counsel, question of actual guilt upon an acceptable guilty plea, a more severe sentence than expected, and mistaken advice of counsel as to parole or probation eligibility. All other grounds for relief which then could have been raised were thereby waived.

10. An omnibus habeas corpus hearing was conducted as to the aforementioned Petition and Amended Petition on October 1, 1998, and February 16, 1999. An Order was entered March 16, 1999 denying the requested writ and dismissing the civil action.

11. A Petition for Appeal was filed as to the aforementioned adverse ruling on July 14, 1999. The Supreme Court of Appeals of West Virginia refused the Petition for Appeal by an Order entered November 18, 1999.

12. On July, 27, 2006, the Inmate Petitioner initiated the case sub judice by filing a Petition for Writ of Habeas Corpus, pro se, alleging various grounds as to his collateral attack of his conviction and/or sentence. In his Petition, the Inmate Petitioner claims that certain serology evidence should be reviewed because his underlying felony conviction falls within the scope of cases contemplated by In Re: Renewed Investigation of State Police Crime Laboratory, Serology Division, 219 W.Va. 408, 633 S.E.2d 762 (2006). He argued that he was not provided the serology test results in question and that the laboratory procedures used to test the applicable evidence were flawed.

13. The Court denied the requested relief in an Order entered November 15, 2006.

14. On March 8, 2007, the Inmate Petitioner, pro se, filed a Petition for Appeal in the Supreme Court of Appeals of West Virginia in regard to the aforementioned adverse Order. In said Petition, the Inmate Petitioner requested that his case be remanded to the Circuit Court of Fayette County for further habeas corpus proceedings concerning serology evidence. The Supreme Court granted said appeal in an Order entered July 31, 2007, and remanded the case, sub judice,

for a habeas corpus hearing concerning the serology evidence pursuant to In Re: Renewed Investigation of State Police Crime Laboratory, Serology Division.

15. By an Order entered November 22, 2011, Thomas Rist, a lawyer with criminal defense experience, was appointed by the Court to represent the Inmate Petitioner. The Inmate Petitioner, by counsel, filed an Amended Petition for a Writ of Habeas Corpus on January 16, 2013. The Amended Petition incorporated the entirety of the pro se Petition and added the argument that the Inmate Petitioner should be permitted to withdraw his guilty plea, if he so desired, due to ineffective assistance of trial counsel. The Inmate Petitioner further claimed that he would not have entered into a plea agreement with the State if he were aware of any exculpatory test results.

16. The Respondent filed a Motion to Dismiss the Inmate Petitioner's Petition on December 31, 2012. In said Motion, the Respondent argued that the serology evidence in question clearly did not inculpate the Inmate Petitioner, and thus did not fall within the range of cases contemplated by In Re: Renewed Investigation of State Police Crime Laboratory, Serology Division .

17. Attached to the Respondent's Motion was a copy of the West Virginia State Police Forensic Laboratory report which concluded that the Inmate Petitioner's DNA and seminal fluid was not found on certain pieces of evidence found at the crime scene.

18. The Respondent also filed a Response to the Petition on January 16, 2013, wherein the Respondent argued that the issue of ineffective assistance of trial counsel had been resolved in the hereinabove mentioned 1997 habeas corpus case. The Respondent further wrote that there was no way to resolve the question of whether the Inmate Petitioner's trial counsel provided the Inmate Petitioner with copies of serology reports because said trial counsel was now deceased.

19. At the aforementioned February 13, 2013, habeas corpus hearing, the Respondent argued that the exculpatory forensic test results were only relevant to the alleged first degree sexual assault allegation, which was dismissed, and that the aforementioned results were not related to the felony crime of first degree murder.

20. The Respondent also argued that the Inmate Petitioner's claim that trial counsel failed to present him with the forensic test results was unreliable because the Inmate Petitioner previously forged a plea agreement. That forged document was offered at the aforementioned October 1, 1998, omnibus habeas corpus hearing in an attempt to bolster the Inmate Petitioner's claim that his guilty plea was involuntary. In the aforementioned Order entered March 16, 1999, the Court wrote as follows:

The Court further finds that the "plea agreement" offered by the petitioner at the hearing on October 1, 1998 was clearly a forgery. The petitioner indicates that he had lost the original when he was transferred from Moundsville to Mount Olive Correctional Center. That would not have been possible because the original was filed with the Court at the plea hearing on March 26, 1993.

CONCLUSIONS OF LAW

1. Jurisdiction and venue are properly in the Circuit Court of Fayette County, West Virginia.

2. The Supreme Court of Appeals of West Virginia set forth the following test to determine if a new trial should be granted because of newly discovered evidence:

> A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that [defendant] was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits.

(5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. Syl. Pt. 2, In Re: Renewed Investigation of State Police Crime Laboratory, Serology Division, citing Syl. Pt. 3, Halstead v. Horton, 38 W.Va. 727; 18 S.E. 953 (1894) and Syllabus, State v. Frazier, 162 W.Va. 935, 253 S.E.2d 534 (1979).

3. The Supreme Court also set forth the following standard for reviewing inmate claims concerning serology evidence:

> "A prisoner against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence and who challenges his or her conviction based on the serology evidence is to be granted a full habeas corpus hearing on the issue of the serology evidence. The prisoner is to be represented by counsel unless he or she knowingly and intelligently waives that right. The circuit court is to review the serology evidence presented by the prisoner with searching and painstaking scrutiny. At the close of the evidence, the circuit court is to draft a comprehensive order which includes detailed findings as to the truth or falsity of the serology evidence and if the evidence is found to be false, whether the prisoner has shown the necessity of a new trial based on the five factors set forth in the syllabus of State v. Frazier, 162 W.Va. 935, 253 S.E.2d 534 (1979)." Syl. Pt. 4, In Re: Renewed Investigation of State Police Crime Laboratory, Serology Division.

4. The facts of the case sub judice clearly do not fall under the range of cases contemplated by In Re: Renewed Investigation of State Police Crime Laboratory, Serology Division. Said decision clearly contemplates a situation in wherein

laboratory serology testing erroneously resulted in falsified or inaccurate inculpatory evidence being used at trial against a criminal defendant. The purpose of the aforementioned Supreme Court decision was to ensure that no criminal defendant was convicted due to faulty serology tests performed by the West Virginia State Police laboratory. In the case sub judice, the Petitioner ultimately argued that he was not provided with exculpatory test results and that said results may have influenced his decision concerning whether to accept or reject the aforementioned plea agreement. The aforementioned Supreme Court decision set forth the means to remedy errors in laboratory testing of evidence. Surely, the Inmate Petitioner does not wish to challenge exculpatory laboratory test results. Since the accuracy of said forensic test results are not in question, In Re: Renewed Investigation of State Police Crime Laboratory, Serology Division clearly does not apply to the facts of the case sub judice.

5. Further, the serology evidence in question was exculpatory concerning the aforementioned sexual assault allegation, which was dismissed pursuant to the terms of the plea agreement.

6. The Inmate Petitioner could not have received a better ultimate result concerning the first degree sexual assault allegation had he gone to trial and was found not guilty of the sexual assault allegation.

7. Nothing in said forensic test results is relevant to the question of whether or not the Inmate Petitioner was guilty of first degree murder.

8. The Inmate Petitioner is not entitled to further habeas corpus review on any issue which was or could have been raised at the omnibus habeas corpus hearing conducted in Civil Action No. 97-C-424-H, including both claims of ineffective assistance by his trial counsel and the involuntariness of his guilty plea. Any grounds for habeas relief which could have been advanced on direct appeal or in a previous post-conviction proceeding, but were not, have been waived. W.Va. Code § 53-4A-1(c).

9. Even if the claim of ineffective assistance of counsel and the claim concerning voluntariness of plea were not waived, the Inmate Petitioner would still not be lawfully entitled to the relief requested in the case sub judice. Our Supreme Court set forth the following test for determining the voluntariness of a guilty plea:

> Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding

process if the case had proceeded to trial; and (3) the guilty plea must have been motivated by this error. Syl. Pt. 3, State v. Sims, 248 S.E.2d 834 (1978).

10. The claims set forth in the Petition and Amended Petition, even if taken as true, would not satisfy the above-quoted test. The forensic test results of which the Inmate Petitioner now claims he was ignorant of at the time of the entry of his guilty plea, apply only to the felony crime of first degree sexual assault, which was dismissed by the Court as part of the aforementioned plea agreement. Said forensic test results, or the lack thereof, had no bearing on the murder charge. The guilty plea was not motivated by this supposed error. The State agreed to and did recommend, though not binding on the Court, at sentencing that the Inmate Petitioner be sentenced with a recommendation of mercy. The Inmate Petitioner's primary incentive for entering a plea of guilty to the felony crime of first degree murder was the hope that it would result in him being sentenced with the aforementioned recommendation of mercy.

11. The Supreme Court of Appeals of West Virginia has adopted the following two-pronged test the United States Supreme Court 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 object 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. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

12. The Inmate Petitioner also failed to demonstrate ineffectiveness of his original trial counsel under the above-quoted standard, by his claim that he was supposedly not informed of the forensic test results. The only basis for this claim is the word of the Inmate Petitioner, who previously forged a plea agreement and is currently serving a life sentence with no opportunity for parole. Since no other evidence of this claim has been presented and the Inmate Petitioner's trial counsel is deceased and cannot testify concerning this issue, the Inmate Petitioner has failed to demonstrate that he did not receive the forensic test results from his trial original counsel.

Accordingly, it is ORDERED that the relief sought by the Inmate Petitioner be and the same is hereby DENIED and the Motion to Dismiss is hereby GRANTED.

The Clerk shall, forthwith, mail an attested copy of this Order to the Petitioner, Inmate Henry K. Wykle, One Mountainside Way, Mount Olive, West Virginia 25185; Thomas Rist, Attorney at Law, 103 Fayette Avenue, Fayetteville, West Virginia 25840; Respondent, David Ballard, Warden Mount Olive Correctional Complex, One Mountainside Way, Mount Olive, West Virginia 25185; and the Fayette County Prosecuting Attorney.

ENTERED this 16th day of May, 2013.

JOHN W. HATCHER, JR.
CHIEF JUDGE

A TRUE COPY of an order entered
16 May 2013
Teste: D E Wright
Circuit Clerk Fayette County, WV