

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

**David R. Leake,  
Petitioner Below, Petitioner**

**vs) No. 15-0416** (Mingo County 14-C-99)

**Karen Pszczolkowski, Warden,  
Northern Correctional Facility,  
Respondent Below, Respondent**

**FILED**

**May 23, 2016**

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

**CORRECTED MEMORANDUM DECISION**

Petitioner David R. Leake, by counsel Karen S. Hatfield, appeals the Circuit Court of Mingo County's April 7, 2015, order denying his petition for writ of habeas corpus. Respondent Karen Pszczolkowski, Warden, by counsel Shannon Frederick Kiser, filed a response.<sup>1</sup> On appeal, petitioner argues that the circuit court erred in finding that it had jurisdiction to enter his criminal conviction, that he received effective assistance of counsel, that venue was proper, and that there was sufficient evidence to convict him.

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

In December of 2007, petitioner was charged with one count of neglect of an elderly person and, pursuant to a plea agreement, he pled guilty to the crime charged. In January of 2008, petitioner was sentenced to an indefinite term of incarceration of not less than two years nor more than ten years. December 26, 2008, petitioner was released from incarceration and placed on probation. In November of 2013, petitioner was convicted of a robbery in Logan County, West Virginia and incarcerated as a result.

In June of 2014, petitioner filed a petition for writ of habeas corpus in the circuit court relating to his January of 2008 guilty plea to neglect of an elderly person. After filing the petition, petitioner was appointed counsel to file an amended petition which alleged twelve grounds for relief. Petitioner's amended petition alleged the following twelve assignments of error: (1) the circuit court lacked jurisdiction due to ineffective assistance of counsel; (2)

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<sup>1</sup>Pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure, we have replaced the original respondent, Karen Pszczolkowski, with Marvin Plumley, who is the current warden of the Huttonsville Correctional Center where petitioner is incarcerated.

petitioner made an involuntary plea; (3) trial counsel failed to appeal petitioner's conviction; (4) ineffective assistance of counsel; (5) no preliminary hearing; (6) petitioner did not receive a copy of his indictment or information; (7) improper venue; (8) petitioner was convicted based on false information; (9) petitioner's conviction was based on insufficient evidence; (10) petitioner's sentence was extreme; (11) petitioner's sentence was excessive; and (12) petitioner received false information regarding parole eligibility. The circuit court then held an omnibus evidentiary hearing on the petition in November of 2014. Petitioner testified that he was never properly informed of the elements of the charge against him or of being classified as a caregiver. He contended that an earlier plea offer imposed a lesser sentence but he refused the original offer upon his counsel's advice. He also testified that he never appeared in magistrate court, never received a copy of the information filed against him, and he accepted the final plea deal out of "fear that he would be incarcerated for a long time." Petitioner also contended that a motion for reconsideration was never filed on his behalf.<sup>2</sup>

On cross-examination, petitioner admitted that he was not formally charged in magistrate court, was advised of his post-conviction rights, and never requested a new attorney. Petitioner admitted that a motion for reduction of sentence was filed on his behalf a year later and he was subsequently incarcerated, after his release, on unrelated charges. Petitioner also admitted that he acknowledged himself to be the caregiver of the elderly victim at the time of his plea agreement and he elected not to read the documents relating to his plea agreement. At the same hearing, respondent presented evidence that petitioner did not call his trial counsel as a witness and he refused to waive privilege and allow such testimony. Respondent also presented evidence that petitioner was never offered an earlier plea agreement. At the close of the hearing, the circuit court found that there was no evidence on the record supporting petitioner's allegation that his trial counsel was ineffective or deficient. The circuit court further found that, considering the totality of the circumstances, petitioner failed to prove his claims regarding his guilty plea and he entered his plea knowingly, intelligently, and voluntarily. The circuit court determined that petitioner was explicitly notified of his right to appeal, waived his appeal, and signed a waiver of indictment. The circuit court also determined that petitioner failed to raise improper venue prior to the habeas proceeding and failed to put forth sufficient evidence to support his improper venue claims. The circuit court found that the underlying record refuted all of petitioner's claims. Thereafter, the circuit court denied the petition by order entered on April 7, 2015. It is from this order that petitioner now appeals.

We review the denial of a petition for a writ of habeas corpus 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

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<sup>2</sup>While the West Virginia Rules of Criminal Procedure do not provide for a motion for reconsideration of sentence, criminal defendants are entitled to seek a reduction of sentence pursuant to Rule 35(b). Accordingly, we will properly refer to petitioner's "motion for reconsideration of sentence" in this memorandum decision as a motion for reduction of sentence or a Rule 35(b) motion.

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). Additionally, we have held that “[o]n an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court.” Syl. Pt. 2, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

On appeal to this Court, petitioner argues that the circuit court erred in finding that it had jurisdiction to enter petitioner’s conviction, he had effective assistance of counsel, venue was proper, and there was sufficient evidence to convict him.<sup>3</sup> Petitioner presents four assignments of error, which can be condensed to two issues: (1) whether the circuit court erred in finding that he had effective assistance of counsel, and (2) whether there was sufficient evidence to convict him. Upon our review and consideration of the circuit court’s order, the parties’ arguments, and the record submitted on appeal, we find no error or abuse of discretion by the circuit court.

Our review of the record supports the circuit court’s decision to deny petitioner post-conviction habeas corpus relief. Indeed, the circuit court’s order includes well-reasoned findings and conclusions as to the assignments of error raised on appeal. Given our conclusion that the circuit court’s order and the record before us reflect no clear error or abuse of discretion, we hereby adopt and incorporate the circuit court’s findings and conclusions as they relate to petitioner’s assignments of error raised herein and direct the Clerk to attach a copy of the circuit court’s April 7, 2015, “Order Denying Petitioner’s Petition For Writ Of Habeas Corpus” to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED: May 23, 2016**

**CONCURRED IN BY:**

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

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<sup>3</sup> Petitioner essentially argues that because his counsel was deficient, the circuit court lacked the jurisdiction to convict him. We have previously held that “[a] trial court lacks jurisdiction to enter a valid judgment of conviction against an accused who was denied effective assistance of counsel and a judgment so entered is void.” Syl. Pt. 25, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). As such, if it is determined that petitioner received effective assistance of counsel, his jurisdictional argument must fail.

15-0416

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel  
DAVID R. LEAKE,

Petitioner,

Civil Action No.: 14-C-99  
Underlying Felony No.: 07-F-71  
Judge Miki Thompson

v.

KAREN PSZCZOLKOWSKI, Warden,  
Northern Correctional Facility,

Respondent.

**ORDER DENYING PETITIONER'S  
PETITION FOR WRIT OF HABEAS CORPUS**

ADMITTED TO RECORD  
2015 APR - 7 1:45  
MINGO COUNTY CIRCUIT COURT

This matter comes before the Court pursuant to Petitioner David R. Leake's Amended Petition, by counsel, Karen S. Hatfield, for Writ of Habeas Corpus, filed on July 22, 2014, pursuant to the West Virginia Post-Conviction Habeas Corpus Act, W. Va. Code § 53-4A-1, *et seq.* The Court has considered the instant Petition, relevant legal authorities, and the complete record in this case and case no.: 07-F-71, and hereby **DENIES** Petitioner's Petition based upon the following Findings of Fact and Conclusions of Law, to-wit:

**I. FINDINGS OF FACT**

1. The Petitioner, David R. Leake, on December 10, 2007, pleaded guilty to Neglect of an Elder Person, reflected by Court Order entered December 12, 2007.
2. On January 16, 2008, the Circuit Court sentenced the Petitioner to an indefinite sentence of no less than two (2) no more than ten (10) years in a state correctional facility.
3. The Petitioner did not appeal his conviction to the West Virginia Supreme Court of Appeals ("Supreme Court").

4. On June 2, 2014, the Petitioner filed a pro se Petition for Writ of Habeas Corpus and on June 24, 2014, the Court appointed Karen S. Hatfield to represent the Petitioner and file an Amended Petition.

5. On July 22, 2014, Karen S. Hatfield filed an Amended Petition and the Court held a hearing in this matter on November 10, 2014.

6. Ronald J. Rumora was counsel for the Petitioner in the underlying felony action. Mr. Rumora is an experienced criminal defense attorney and his representation of the Petitioner was professionally competent under an objective standard of reasonableness.

7. In the Amended Petition, the Petitioner alleges twelve ground of error: (1) the trial court lacked jurisdiction; (2) the guilty plea was involuntary; (3) trial counsel failed to take an appeal; (4) ineffective assistance of trial counsel; (5) there was no preliminary hearing in the underlying case; (6) defendant did not receive a copy of the indictment; (7) improper venue; (8) claims concerning use of informers to convict; (9) insufficient evidence to convict; (10) the sentence was more severe than expected; (11) the sentence was excessive; and (12) mistaken advice of trial counsel as to parole or probation eligibility.

## **II. CONCLUSIONS OF LAW**

1. W. Va. Code § 53-4A-3 instructs that a writ of habeas corpus is to be granted if the Court finds probable cause to believe that the Petitioner may be entitled to some relief, and the contentions or grounds advanced have not been previously and finally adjudicated or waived.

2. To prevail in a habeas corpus action, the "petitioner has the burden of

proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release.” Syl. Pt. 1, *State ex rel. Scott v. Boles*, 147 S.E. 2d 486 (W.Va. 1966).

3. 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). First, the defendant must show that counsel’s performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The first prong requires a “showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment of the United States Constitution. *Id.* The second prong requires a “showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

4. No evidence on record in this case or in the underlying felony action fully supports a contention that Mr. Rumora was ineffective or deficient. Further, the Court finds no prejudice to the defense of the Petitioner in his underlying felony action by having Mr. Rumora as counsel.

5. It is true that “[a] trial court lacks jurisdiction to enter a valid judgment of conviction against an accused who was denied effective assistance of counsel and a judgment so entered is void.” Syl. Pt. 25, *State v. Thomas*, 157 W. Va. 640 (1974). Because Mr. Rumora is found competent, the Court finds that the trial court had jurisdiction to enter a judgment of conviction in the underlying felony action.

6. Due Process requires that a guilty plea be voluntary, knowing, and intelligent. The pleader has the burden of proving that a plea was involuntary. *State ex rel. Clancy v. Coiner*, 154 W. Va. 857 (1971). The voluntariness of a guilty plea must be

397 U.S. 742, 90 S. Ct. 1463 (1970).

7. The record reflects that the Petitioner signed a Plea Agreement on December 10, 2007, and in paragraph nine (9), the Agreement states: “[t]he Defendant knowingly, voluntarily and intelligently signed this plea agreement after consulting with counsel and fully understand[s] the consequences thereof.” The record also reflects that the Petitioner signed each page of his Petition to Enter Guilty Plea, also entered December 10, 2007. Further, at the plea hearing, the Court made an inquiry and found that the Defendant knowingly, intelligently, and voluntarily entered into a guilty plea in the underlying felony matter. At the habeas hearing, the Petitioner acknowledged that he is able to read, but he testified that he did not read any documents before signing his name to them.

8. The Court finds, after considering the totality of the circumstances, that the Petitioner entered a guilty plea in the underlying felony knowingly, intelligently, and voluntarily. The Court finds that the Petitioner has not met his burden in showing that the plea was involuntary.

9. The Petitioner, in argument three (3) of his Amended Petition, alleges that counsel failed to inform him of his right to appeal from a guilty plea. The record reflects that the Petitioner signed a Notice of Post-Conviction Rights on December 10, 2007. Said Notice explains Petitioner’s appeal rights. Therefore, the Court finds that Petitioner was informed of his right to appeal his guilty plea.

10. The Petitioner, in argument five (5) of his Amended Petition, alleges that he did not receive a preliminary hearing. The record reflects that the Petitioner pleaded

guilty by information and also reflects that the Defendant signed a Waiver of Indictment on December 10, 2007.

11. The Court finds, pursuant to Rule 5 of the West Virginia Rules of Criminal Procedure, that because the Defendant pleaded guilty by information, he was not entitled to a preliminary hearing in the underlying felony action.

12. The Petitioner, in argument six (6) of his Amended Petition, alleges that he did not receive a copy of the indictment or information in the underlying felony action. The record reflects that the Petitioner did in fact receive a copy of his information and that he signed a Waiver of Indictment.

13. Pursuant to Petitioner's seventh argument, the Court finds that the Petitioner failed to meet his burden showing improper venue, that the Petitioner never challenged venue at any time prior to the filing of the Amended Petition, and that venue was proper.

14. The Petitioner, in argument eight (8) of his Amended Petition, alleges that charges against him were brought solely on the grounds of testimony of Jennifer Keyser. The Petitioner fails to cite any facts or case law that shows this is true and/or improper. Thus, the Court finds that the Petitioner has failed to meet his burden that this allegation warrants his release.

15. In order to prevail in a claim of insufficient evidence to convict, "the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." *State v. Guthrie*, 194 W. Va. 657 (1995). The Court finds, after considering the record, that the State had sufficient evidence to convict the Petitioner in the underlying felony action.



16. Petitioner's Plea Agreement, in paragraphs two and three, states that "[t]he penalty for said Neglect of an Elder Person is imprisonment in the penitentiary for not less than two (2) nor more than ten (10) years," and "[t]he State will take no position with regards to sentencing in this matter." The Court finds, after considering the record, that the Petitioner failed to meet his burden in showing that his sentence was severer than expected or excessive.

17. The Petitioner testified at the habeas hearing that he was advised by Mr. Rumora that he would be out of jail in ninety (90) days if he accepted the plea. Nothing in the record shows that the Petitioner would be out of jail in ninety (90) days if he accepted the plea. Further, at the plea hearing, the Petitioner acknowledged that no promises regarding sentencing were made to him. After considering the record and Petitioner's testimony, the Court finds that the Petitioner has not met his burden in showing that this allegation is true and warrants his release.

### III. JUDGMENT

**WHEREFORE**, the Court has considered the instant Petition and all grounds for relief asserted therein and does hereby **DENY** the Petitioner's Amended Writ of Habeas Corpus. This shall be entered as a **FINAL ORDER** which any party may appeal in accordance with the West Virginia Rules of Appellate Procedure.

The Clerk is hereby **DIRECTED** to strike this case from the active docket of this court. The Clerk is further **DIRECTED** to send attested copies of this Order to Karen S. Hatfield, David R. Leake, and Teresa Maynard, Esq.

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

DAVID R. LEAKE, ADMITTED TO RECORD  
Petitioner, 2014 JUN 24 P 4:28

v.

MINGO COUNTY CIRCUIT CLERK

Civil Action No.: 14-C-99  
Underlying Felony Case No.: 07-F-71  
Circuit Judge Miki Thompson

KAREN PSZCZOLKOWSKI, WARDEN,  
Northern Correctional Facility,  
Defendant.

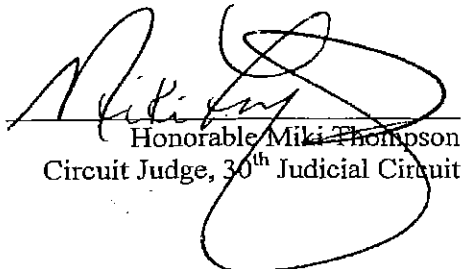
ORDER APPOINTING COUNSEL

This matter comes before the Court on Petitioner's Petition for Habeas Corpus relief. The Court has considered the instant Petition and finds that the Petitioner may have grounds for relief but the Petition, as filed, is not sufficient for the Court to conduct a fair adjudication of the matters raised therein. Thus, this Court hereby **APPOINTS** Karen Hatfield, Esq. to represent the Petitioner in this matter.

Karen Hatfield is hereby **ORDERED** to file an Amended Petition on behalf of Petitioner within thirty (30) days of receipt of this Order.

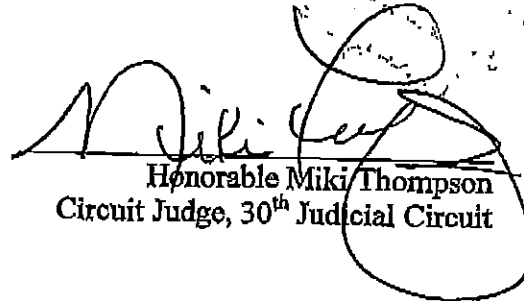
The Clerk is **DIRECTED** to send a copy of Petitioner's Petition for Writ of Habeas Corpus to Karen Hatfield, Esq. The Clerk is further **DIRECTED** to send attested copies of this Order to all counsel of record and any pro se party.

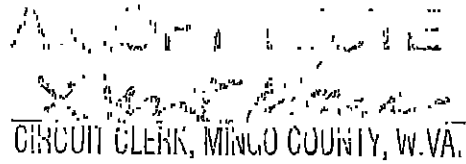
ENTERED this the 24<sup>th</sup> day of June 2014.

  
Honorable Miki Thompson  
Circuit Judge, 30<sup>th</sup> Judicial Circuit

A COPY TESTE  
  
CIRCUIT CLERK, MINGO COUNTY, W.VA

ENTERED this the 7<sup>th</sup> day of April 2015.

  
Honorable Miki Thompson  
Circuit Judge, 30<sup>th</sup> Judicial Circuit

  
CIRCUIT CLERK, MINGO COUNTY, W.VA.