

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES R. MEADOWS,
PETITIONER BELOW, PETITIONER

vs.)

No. 18-0418
(13-C-69)

RALPH TERRY, ACTING WARDEN,
MT. OLIVE CORRECTIONAL COMPLEX,
RESPONDENT BELOW, RESPONDENT

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. **THE CIRCUIT COURT ERRED IN FAILING TO GRANT RELIEF BASED UPON THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.**
 - a. **TRIAL COUNSEL CONDUCTED AN INADEQUATE INVESTIGATION.**

Respondent asserts that the contact that Mr. Meadow's trial counsel had with him before and after hearings and during the course of the trial is sufficient for effective representation. Ultimately this Court must decide the standards that are going to be imposed upon defense counsel. Is the Court going to permit lawyers to avoid meaningful contact by allowing incidental contact at hearings to suffice? With the most serious charges, are attorneys going to be permitted to fly by the seat of their pants or is this Court going to demand careful and strategic preparation? Regardless of Respondent's attempts to justify trial counsel's actions and preparation, only one conclusion is reasonable from a review of the totality of the circumstances. Trial counsel was grossly unprepared. Trial counsel failed to have any meaningful contact with his client or the witnesses. Trial counsel failed to properly investigate the case or prepare for trial. In this case, the failures led to a wrongful conviction.

To demonstrate the wholesale lack of effective representation, Petitioner now addresses those areas identified by Respondent as demonstrating adequate investigation. First, Respondent relies on the testimony of trial counsel that he met with Mr. Meadows an estimated twenty times at various court hearings,¹ was involved in the representation of Petitioner in the abuse and neglect proceedings over numerous days, and met with the family of "pretty close to a daily basis." (Respondent's Brief at p. 18). Attorneys are required to have communication with their

¹ The only testimony on the record is that the meeting lasted for five to ten minutes each. (A806807).

clients in a way that preserves client confidences. W.Va.R.Prof.C.od. 1.6(c).² There is no evidence in this record that trial counsel ever met with Mr. Meadows in a confidential setting. Mr. Meadows was in custody for Murder in the First Degree for all relevant times of the representation. Any fleeting meeting at or before a hearing at the courthouse would be subject to Petitioner being in custody in an unsecure setting. That is not a circumstance where meaningful confidential communication can occur. Mr. Meadow's family and witnesses deny that trial counsel was in meaningful contact with them. As detailed in Petitioner's Brief five of ten lay witnesses (including Petitioner's mother) testified that trial counsel never spoke to them to prepare them for their testimony at the trial. (A801, A816-818, A795-796). But even if trial counsel was in contact with the family, how was that to be conveyed to Mr. Meadows? He was in custody. Any communications between him and his family would be subject to monitoring. A lawyer shall "(3) keep the client reasonably informed about the status of the matter" and "(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." W.Va.R.Prof.Cond. 1.4. Informing the family does not comply with the ethical or practical obligations of counsel.

Respondent next relies on the fact that trial counsel hired an investigator who met with Mr. Meadows at the "jail several times." (Resp. Br. at 19). There is no evidence in the record that any information from these meetings were conveyed to trial counsel. In fact, there is no evidence that these meetings were substantive at all. The State chose not to offer any evidence from the investigator at the hearing.

With regard to preparing Mr. Meadows to testify at trial, Respondent relies on communications he allegedly had with Petitioner during the course of the trial. (Resp. Br. at 20).

² A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized

This completely ignores Mr. Meadow's testimony cited in Petitioner's Brief that no such communication occurred. But, even if it did, it again was in a room at the courthouse while Petitioner was in custody...not a setting for meaningful communication.

The most persuasive evidence in this case is that trial counsel had little to no meaningful communication with his client. The trial court in the habeas corpus proceeding erred in failing to grant relief on this issue.

b. TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO EVIDENCE OF ACTUAL INNOCENCE.

Respondent discounts the testimony of witnesses Indie Riley and Stephanie Witham as "speculation and assumptions." (Resp. Br. at 22). However, the testimony of these witnesses consists of admissions of responsibility for the crimes made by the only other person that could have committed the crimes of which Petitioner is convicted, Cristen H.

Respondent attempts to portray the failure to use the testimony of Indie Riley as a strategic choice made by an informed counsel who spoke to her after having reviewed her statement. (Resp. Br. at 22-23). There is overwhelming evidence that trial counsel was mistaken in his belief that he had any pre-trial contact with Indie Riley. Indie Riley expressly and clearly denies any such contact. (A778-781). More importantly, the investigator for the prosecution who took the statement, Garry Wheeler, confirms that no one had the statement. (A794-795, A804). Further, the trial transcript reveals that no one had the transcript of her statement. (A486-490). This issue alone deserves relief as it was not addressed at all by the trial court.

Respondent asserts that Petitioner has "grossly mischaracterize[d]" the statement of Stephanie Witham. (Resp. Br. at 24). Respondent believes that the testimony of Stephanie

Witham in regards to the admissions made to her by Cristen H. were in regards to the child's broken arm from days before the child's death. (Resp. Br. at 24). Cristen H. admitted to Stephanie that she went too far and that the baby was crying and would not "shut up" **on the night before and morning of the child's death.** (A673, A681, A682). Cristen H. had also admitted to her that the baby was having trouble breathing when she put the child on Petitioner's chest the morning when the child died. (A682, A683). A jury could and would conclude that the "went too far" comment meant far more than breaking the child's arm two days before her death...it was about causing the child's death.

It is important to note that neither the trial court order nor Respondent's Brief addresses the testimony of Garry Wheeler. As detailed in Petitioner's Brief, Mr. Wheeler, an experienced law enforcement officer and investigator who obtained these statements believed them to be both credible and exculpatory. (Pet. Br. at 6-7, 15-16; A796-800).

**c. TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO
ELICITING EVIDENCE OF POLYGRAPH TESTING.**

Respondent argues that the introduction of polygraph evidence by Petitioner's trial counsel was not ineffective as there was no prejudice because other witnesses had confirmed that Cristen H. was an untruthful person. (Resp. Br. at 27-28). Respondent's argument actually demonstrates Petitioner's point. This trial was a credibility contest between Petitioner and Cristen H. Through Petitioner's own trial counsel multiple unchallenged references were made to Cristen H. passing a polygraph test as to this crime! Then once the error was made, counsel took no effort to correct it. Jurors believe in polygraph tests. The reason we keep the results out is that they are not proven as accurate, but people place undue trust in their validity. Here no competent counsel would have acted as Petitioner's counsel did and the prejudice is obvious.

The jury believed the “liar” and convicted Petitioner. As noted in Petitioner’s Brief, Petitioner, the only one who could possibly know the effect of the photo on his testimony, confirmed that it had a severe effect upon him.

d. TRIAL COUNSEL WAS INEFFECTIVE IN ALLOWING THE CONTINUOUS DISPLAY OF THE VICTIM’S PHOTOGRAPH.

Respondent asserts that the transcript does not demonstrate any effect on Petitioner’s testimony from the continuous display of the autopsy photograph of the victim and that the decision not to object was strategic decision of counsel. As an initial matter, the objection could and should have been made outside of the presence of the jury...there was no need to have a strategy to minimize the impact on the jury because the jury need not know about the objection. Respondent does not address the habeas court’s failure to address this issue squarely in its order. The issue was not the admission of the photograph, but its continuous display during Petitioner’s testimony.

e. TRIAL COUNSEL WAS INEFFECTIVE IN ASCERTAINING PETITIONER’S WISHES CONCERNING A CHANGE OF VENUE AND ENSURING THAT A PROPER RECORD WAS MADE OF THE DECISION TO CHANGE VENUE.

Respondent’s Brief does not address the substance of Petitioner’s argument. Trial counsel had a duty to create a sufficient record of the change of venue to allow appellate review. As detailed in Petitioner’s Brief that did not happen. Respondent cannot identify and has not cited any portion of the record detailing how or when the decision to change venue was made. It

is simply not part of the record.³ As demonstrated in Petitioner's Brief, trial counsel was thoroughly ineffective in dealing with this issue.

f. TRIAL COUNSEL WAS INEFFECTIVE IN ADDRESSING PLAY THERAPY EVIDENCE.

Respondent asserts that Petitioner did not adequately articulate his argument concerning this issue. (Resp. Br. at 34-35). As an initial matter, Petitioner certainly raised far more than an issue "in passing." Petitioner identified the exact testimony that Petitioner contends was inadmissible. Respondent's assertion that this is a skeletal argument when it constitutes four pages of the brief and citation to multiple legal references and portions of the transcript is simply unfair.

Respondent spends the entire argument discussing what Petitioner did not show. Respondent would have been better served focusing on what Petitioner did demonstrate. Petitioner must appeal the ruling of the trial court. Here, the trial court determined that the statements identified provided context, and were thus admissible. Petitioner contends that the statements are not admissible for the very reasons identified in Petitioner's Brief and were not context as held by the trial court.

This Court specifically found that trial counsel had not properly objected to the evidence. Here, because of the failure to object significant evidence was admitted not about the victim of the crime, but about speculation of the meaning of interactions with the victim's brother. The testimony was damaging and should not have been admitted. Trial counsel should have properly objected.

³ The only citation by Respondent comes in the judge's charge to the jury that head the case and does not detail what happened in any meaningful way.

**2. THE CIRCUIT COURT ERRED IN FAILING TO GRANT RELIEF BASED
UPON CUMULATIVE ERROR.**

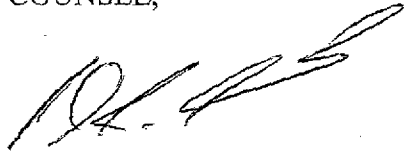
Obviously Petitioner is asserting that the errors cited above, even if not enough individually to warrant relief, warrant relief when considered together. Despite Respondent's assertion to the contrary, Petitioner cannot contemplate how repeating those errors again after having just reviewed them in detail in the brief would be useful.

CONCLUSION

For all these reasons, Petitioner respectfully requests that this Court grant his appeal and provide that relief which is deemed just and appropriate.

RESPECTFULLY SUBMITTED,
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BY COUNSEL,



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