FILED
March 20, 2024
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Gregory C. Burdette,
Petitioner Below, Petitioner

v.) No. 22-700 (Kanawha County 17-P-299)

Josh Ward, Interim Superintendent,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Gregory C. Burdette appeals the Circuit Court of Kanawha County's December 6, 2021, order denying his third petition for a writ of habeas corpus.[1] On appeal, petitioner claims error in the court's application of principles of res judicata and in its denial, notwithstanding the finding of res judicata, of his claims pertaining to jury selection, his sentence, the serological evidence used at trial, and the sufficiency of the evidence to support one of his convictions. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21(c).

At the conclusion of a jury trial held in 1986, petitioner was convicted of six counts of forgery, six counts of uttering, one count of kidnapping, and one count of first-degree murder.[2] The jury recommended mercy on his first-degree murder conviction, but it did not recommend mercy on the kidnapping conviction. Accordingly, petitioner's sentences resulted in life incarceration without the possibility of parole.

Petitioner filed a direct appeal with this Court in 1989, which we refused that same year. In 1993, petitioner, with the assistance of counsel, filed his first petition for a writ of habeas corpus

[1] Petitioner appears by counsel Mark A. Barney, and respondent appears by Attorney General Patrick Morrisey and Assistant Attorney General Mary Beth Niday. Since the filing of this case, the superintendent of Mt. Olive Correctional Complex has changed, and the interim superintendent is now Josh Ward. Accordingly, the Court has made the necessary substitution of parties pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure.

[2] For a full recitation of the factual and procedural history of petitioner's case, see *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 685 S.E.2d 903 (2009).

in circuit court. Petitioner raised various grounds for relief, including a claim that he was denied due process and a fair trial by the introduction of tainted serological evidence. Specifically, a serologist other than Fred Zain testified that saliva found on a cigarette butt near the victim's body and saliva on petitioner's known cigarette butts were tested for blood type, and both samples revealed Type O blood.[3] After the court held an evidentiary hearing, it denied petitioner habeas relief in a detailed order addressing the merits of each claim raised. Petitioner appealed the court's order to this Court, which we refused in 2005.

Approximately two years later, petitioner, self-represented, filed a second petition for habeas relief in circuit court. Petitioner invoked *In re Renewed Investigation of State Police Crime Laboratory, Serology Division*, 219 W. Va. 408, 633 S.E.2d 762 (2006) [hereinafter "*Zain III*"], wherein we authorized, under certain conditions that petitioner met, the filing of a successive habeas petition based on the serology evidence, despite a prior final adjudication of a challenge to that evidence. Counsel was appointed to represent petitioner in the second habeas proceeding, and he then moved for post-conviction DNA testing of the cigarette butt. Following a hearing, the court denied petitioner's motion for DNA testing. Petitioner filed a petition for a writ of mandamus with this Court, seeking a writ directing the circuit court to grant him the requested DNA testing.

In *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 685 S.E.2d 903 (2009), we denied petitioner's request for mandamus relief. We concluded that he was not entitled to mandamus relief because, although a defendant has "the absolute right to ask for DNA testing," he has no "absolute right to have DNA testing conducted." *Id.* at 333, 685 S.E.2d at 911. Furthermore, this Court's "thorough review of the record reveal[ed] that even without the cigarette butt, the State still had overwhelming evidence to convict the petitioner."[4] *Id.* at 332-33, 685 S.E.2d at 910-11.

In his next collateral attack, petitioner initiated the instant proceeding by filing his third petition for habeas relief in circuit court. Petitioner, represented by counsel, raised four grounds for relief: (1) the use of the key-man jury system denied him grand and petit juries that included a fair cross-section of Kanawha County, West Virginia, and denied him equal protection of the law; (2) disproportionate sentence; (3) the introduction of "tainted" serological evidence denied him the right to a fair trial; and (4) the evidence was insufficient to support a conviction for robbery. Without holding a hearing, the court denied petitioner habeas relief on December 6, 2021. Although the court concluded that petitioner's prior habeas proceedings were res judicata as to the grounds now raised, it nevertheless addressed each contention and concluded that each lacked merit. Petitioner now appeals.

Petitioner raises five assignments of error. In his first, he claims error in the court's application of principles of res judicata in view of this Court's reluctance to "rigidly enforce [this doctrine] where to do so would plainly defeat the ends of justice." *Blake v. Charleston Area Med.*

[3] The serologist also testified that thirty-four percent of the population are Type O secreters.

[4] Following the issuance of this opinion, petitioner's counsel filed a motion to withdraw in circuit court, noting that this Court's denial of petitioner's petition for mandamus relief "disposed of" any issues surrounding the requested DNA testing and that any other claimed errors of a constitutional magnitude had been litigated.

Ctr., 201 W. Va. 469, 478, 498 S.E.2d 41, 50 (quoting *Gentry v. Farruggia*, 132 W. Va. 809, 811, 53 S.E.2d 741, 742 (1949)). In his remaining four assignments of error, he claims error in the court's conclusions reached on the merits of the grounds for habeas relief he raised. Our review of the court's order denying habeas relief is for an abuse of discretion; however, we review underlying findings of fact under a clearly erroneous standard and question of law de novo. Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

The post-conviction habeas corpus statute

> contemplates that every person convicted of a crime shall have a fair trial in the circuit court, an opportunity to apply for an appeal to this Court, and *one* omnibus post-conviction habeas corpus hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated.

Losh v. McKenzie, 166 W. Va. 762, 764, 277 S.E.2d 606, 609 (1981) (emphasis added). Subject to few exceptions, once a "prisoner has had a full and fair opportunity with the assistance of counsel to litigate all issues at some stage of the proceedings," res judicata applies. *Id.* at 766-67, 277 S.E.2d at 610. *Zain III*—outlining one exception—"suspend[ed] to a limited degree the rules of *res judicata* that generally apply," allowing for the filing of a successive habeas petition challenging the serology evidence in certain instances, despite a litigant's earlier having challenged that serology evidence. 219 W. Va. at 415, 633 S.E.2d at 769. We have also authorized the filing of a successive habeas petition raising "ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively." *Losh*, 166 W. Va. at 762-63, 277 S.E.2d at 608, Syl. Pt. 4, in part. Otherwise, "[a] prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known." *Id.*

Petitioner has received all that he is entitled to receive. Petitioner has not here, in his third habeas proceeding, raised a ground that can be pursued in a successive habeas petition, and the "ends of justice" will not be defeated by the enforcement of principles of res judicata. To the contrary, "we do not believe that a prisoner is entitled to habeas corpus upon habeas corpus." *Losh*, 166 W. Va. at 766, 277 S.E.2d at 610. And where habeas procedures are followed—as they have been here—"res judicata should virtually preclude subsequent applications by prisoners so that judicial resources will not be sapped by continual consideration of habeas corpus claims that have already been addressed." *Id.* at 771, 277 S.E.2d at 612. Consequently, we find no error in the court's conclusion that petitioner's instant habeas petition is barred by the doctrine of res judicata, and because res judicata provides a sufficient basis for affirming the court's denial of habeas relief, we need not consider petitioner's remaining assignments of error challenging the court's conclusions on the merits of his third habeas petition.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 20, 2024

CONCURRED IN BY:

Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn

DISQUALIFIED:

Chief Justice Tim Armstead