

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Michael Hodge,
Petitioner Below, Petitioner

v.) **No. 22-715** (Fayette County CC-10-2022-C-20)

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

MEMORANDUM DECISION

Petitioner Michael Hodge appeals the Circuit Court of Fayette County’s August 9, 2022, order summarily denying and dismissing his petition for post-conviction habeas corpus relief pursuant to West Virginia Code § 53-4A-3(a) and Rule 4(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia.¹ The petitioner argues that the circuit court abused its discretion by failing to appoint counsel and by failing to provide the petitioner certain documents. 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.

The petitioner was convicted of conspiracy to commit a felony, attempted robbery in the first degree, malicious assault, and assault during the commission of a felony in December 2018. This Court affirmed the petitioner’s convictions in *State v. Hodge*, No. 19-0316, 2021 WL 195284 (W. Va. Jan. 20, 2021) (memorandum decision), which contains a detailed recitation of facts underlying those convictions. Petitioner, self-represented, filed his initial habeas petition on the standard form alleging: 1) the jury pool was not an accurate cross-section of the community, 2) disparate sentence from his codefendants, 3) erroneous jury instruction, 4) ineffective assistance of counsel, 5) denial of the constitutional right to a public trial, and 6) cumulative error.

The circuit court, which was the same court that presided over the petitioner’s underlying case, summarily denied the petition in a detailed thirty-three-page order, finding that it was not necessary to appoint counsel or hold an evidentiary hearing to resolve the issues raised because of

¹ The petitioner is self-represented. Respondent Josh Ward, Interim Superintendent, Mt. Olive Correctional Complex, is represented by Attorney General Patrick Morrissey and Deputy Attorney General Andrea Nease Proper. Since the filing of this case, the Superintendent of Mt. Olive Correctional Complex 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.

the nature of the claims and the detail of the underlying record, including the appellate memorandum decision. The court dispensed with the petitioner's challenge to the jury pool, explaining that the circuit clerk uses random methods to select a jury pool and that the petitioner provided no factual details supporting his claim such as "systemic exclusion" based on race, any specific facts regarding the methods used to select the jury pool, the actual jury selection process in the petitioner's case, and final composition of the jury in the petitioner's case.² It found that the petitioner's claim of disparate sentence was largely addressed by this Court on direct appeal in its consideration of the petitioner's claim that his sentence was excessive.³ The circuit court also found that the sentences imposed on the defendants were proper and consistent with the circumstances relevant to each defendant. Moreover, the court determined that, for the same reasons this Court found the sentence imposed on the petitioner was not excessive, the petitioner and his codefendants were not similarly situated, so any disparity in sentences was not unconstitutional and that no improper factor was considered in arriving at the appropriate sentence. The court also determined that the petitioner's challenge to a jury instruction was baseless after comparing the challenged instruction to the relevant statutory provision, as was the petitioner's claim that he was denied a public trial due to the removal of a spectator where the trial transcript reflected that no such event occurred. Even if it had, the court found, it would have been within a court's inherent authority to control proceedings and not a constitutional violation of the petitioner's right to a fair trial.

Addressing the petitioner's claims of ineffective assistance of counsel, the circuit court noted that, in all but two instances, the petitioner predicated his claim on a failure to raise or appropriately assert the errors he alleged as standalone habeas claims—i.e., the claimed errors that the court determined lacked a basis in law and/or fact.⁴ In one of the remaining two claims, the petitioner alleged that trial counsel failed to adequately cross-examine witnesses, but he failed to identify any witness testimony in support of that claim. In the second, the petitioner claimed that

² The circuit court noted that this claim was rejected by this Court in the petitioner's direct appeal. In *Hodge*, the petitioner failed to support the claim that his right to be tried by a cross-section of his peers was violated as required under West Virginia Rule of Appellate Procedure 10(c)(7) and so this Court declined to address that assignment of error. 2021 WL 195284, at *10. Although the petitioner's direct appeal was referenced in passing by the circuit court in its discussion on this point, it did not rely on this Court's decision in its ultimate finding that the petitioner's claims related to the jury pool were inadequately supported by factual assertions in his habeas petition.

³ In evaluating the claim of an excessive sentence in *Hodge*, we considered the violent nature of the crime, the petitioner's criminal history that demonstrated a propensity for violence, and that the petitioner failed to accept any responsibility for his conduct and found that the petitioner's sentence was not excessive. 2021 WL 195284, at *8-9.

⁴ Specifically, the petitioner alleged that his trial counsel failed to object to the allegedly erroneous jury instruction and failed to object to the claimed issues involving the jury pool. He alleged that his appellate counsel failed to "present the jury instruction issue under a plain error analysis," did not properly present the jury pool issue, and failed to argue "a sentencing disparity between the codefendants in conjunction with his asserted proportionality analysis."

trial counsel failed to properly advance his alibi defense; however, the record in the underlying matter reflected that the petitioner voluntarily withdrew that defense. Accordingly, the circuit court found that the petitioner was unable to establish ineffective assistance of counsel for a failure to pursue an alibi defense under *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Finally, the court found no cumulative error given the petitioner's failure to establish any error.

The petitioner now appeals, asserting two assignments of error. First, the petitioner argues that the court abused its discretion by failing to appoint habeas counsel before denying his petition. Second, the petitioner argues that the court erred in failing to provide him with documents which would permit a "meaningful habeas corpus petition." We have held that

[i]n 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.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). A circuit court's refusal to appoint counsel or hold a full evidentiary hearing is reviewed for abuse of discretion. *Gibson v. Dale*, 173 W. Va. 681, 688, 319 S.E.2d 806, 813 (1984).

Regarding the petitioner's claim that the circuit court erred in denying his petition without appointing counsel, we have held that a trial judge may summarily deny unsupported claims without appointing counsel or holding an evidentiary hearing if it determines the petition submitted fails to show probable cause warranting further inquiry. Syl. Pt. 1, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973) ("A court . . . may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief."); *see also Losh v. McKenzie*, 166 W. Va. 762, 771, 277 S.E.2d 606, 612 (1981) ("A mere recitation of any of [the] enumerated grounds without detailed factual support does not justify the issuance of a writ, the appointment of counsel, and the holding of a hearing."); W. Va. Code § 53-4A-7(a) (discussing the circuit court's role in determining whether there is probable cause to believe the petitioner may be entitled to some relief). Here, the circuit court found that it was capable of fairly adjudicating the petition without further briefing, appointing counsel, or conducting an evidentiary hearing based on the claims raised, the detail provided in the record, and this Court's memorandum decision resolving the petitioner's direct appeal. We agree. The circuit court order addressed each of the issues raised by the petitioner and explained in detail why there was no basis for relief. Accordingly, under the circumstances of this case, we cannot say that the circuit court abused its discretion in summarily denying the petition.

In his second assignment of error, the petitioner contends that he requested transcripts and documents from his appellate counsel and the circuit court but did not receive those documents. However, although he asserts the copies were largely illegible, the petitioner admits that his appellate counsel had, and provided to him, transcripts from his trial. Further, while it is true that an indigent petitioner is entitled to a free transcript of the entire record of his case, it is incumbent

upon him to make a request. *See State ex rel. Tackett v. Poling*, 243 W. Va. 266, 274-75, 843 S.E.2d 518, 526-27 (2020) (discussing the provision of documents, including a free copy of the transcript of the proceedings, upon request, to a petitioner in a habeas corpus proceeding when the petitioner is an indigent criminal defendant who has entered a plea of guilty and has not previously obtained the documents to which he or she is entitled). The petitioner points to no part of the record on appeal indicating a request for documents to the circuit court or indicating that he advised the court that his appellate counsel did not provide him with appropriate copies of requested documents and so his claim to the contrary is unsupported. Significantly, the standard form used by the petitioner for filing his petition provides an opportunity to make such a request, and the petitioner did not do so.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 30, 2024

CONCURRED IN BY:

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