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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MARK SOWARDS

Petitioner,

v.

Case No.: 18-C-325

Underlying Criminal Case No.: 10-F-351

Judge: Gregory Howard

DONNIE AMES, Superintendent
Mt. Olive Correctional Complex and Jail,

Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On the 12th day of May, 2021, this matter came on for hearing upon the Petition for Writ of Habeas Corpus filed by the Petitioner on or about March 8, 2021. The following parties were present: Mark Sowards, Petitioner, in person and by counsel, Juston H. Moore, Esq.; and Donnie Ames, by and through counsel, Jennifer Skragg Karr, Esq., Special Assistant Prosecutor; before the Honorable Gregory Howard, Judge of this Court.

PROCEDURAL HISTORY

This matter came before this Court on June 14, 2018 when the Petitioner, by previous counsel, Robert P. Dunlap, II Esq., filed a Petition for Writ of Habeas Corpus Relief. Mr. Dunlap was granted permission to withdraw as counsel by order entered on or about December 16, 2019. Mr. Sowards subsequently requested court-appointed counsel, which was granted and Owen Reynolds, Esq. was appointed as counsel for Mr. Sowards by order entered February 28, 2020. Mr. Reynolds was granted permission to withdraw as counsel by order entered on or about May 22, 2020, and Juston H. Moore, Esq. was appointed as counsel for Mr. Sowards by order entered on or about June 2, 2020.

Mr. Sowards, by counsel, filed a Habeas Corpus Brief on or about March 8, 2021. The Special Assistant Prosecuting Attorney filed a Response on or about April 16, 2021. This matter proceeded to an in person omnibus hearing on or about May 12, 2021. The Court heard testimony from John Laishley, Esq., who served as counsel in Petitioner's underlying criminal trial in Cabell County Case Number 10-F-351. The Court also heard testimony from Mr. Sowards as well as a statement from Mr. Sowards' wife.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the evening of August 11, 2008, after a birthday dinner with his wife, Mr. Sowards went to the Blackhawk Grille to join in a game of Texas Hold'em poker. Mr. Sowards arrived at approximately 8:00pm and paid three hundred dollars (\$300.00) to "buy-in" to the game. After playing for several hours a person who was unknown to Mr. Sowards arrived at Blackhawk Grille to play poker as well. This person, later identified to Petitioner as Tim Rosinsky, sat down to the immediate right of Mr. Sowards. During the evening, Mr. Sowards and Mr. Rosinsky had a verbal confrontation regarding Mr. Sowards' earring and his sexual orientation. Another attendee, Craig Brumfield, disrupted the confrontation and sat between Mr. Sowards and Mr. Rosinsky for a while during the evening. Eventually, Mr. Sowards and Mr. Rosinsky reconciled and continued to play for the rest of the night.

It was a common consensus among the witnesses that Mr. Rosinsky was the big winner of the night; however, at one point, Mr. Rosinsky had to "buy-in" again. Mr. Rosinsky testified that when he bought back in, he spent three hundred dollars (\$300.00) which left him ten dollars (\$10.00) in his wallet. At one point during the evening, one hand won by Mr. Rosinsky "wiped out" Mr. Sowards requiring Mr. Sowards to "buy-in" again. Mr. Sowards had no money so the "house" allowed him two hundred dollars (\$200.00) credit to continue playing.

In the early morning hours of August 12, 2008, the game wound down and the players began to cash out. Mr. Sowards cashed out prior to Mr. Rosinsky and momentarily forgot that he had playing on the house so at the end of the night he owed the house approximately seven dollars (\$7.00). Mr. Rosinsky cashed out prior to Mr. Sowards and according to the witness won approximately three thousand dollars (\$3,000.00). However, the house was only able to give Mr. Rosinsky approximately one thousand four hundred dollars (\$1,400.00) in cash that night.

When Mr. Sowards left Blackhawk Grille, he walked across the street to his vehicle and decided he needed to relieve himself beside the building. Mr. Sowards testified that after he finished relieving himself, he heard a commotion in the parking lot at the Blackhawk Grille. Mr. Sowards testified that he saw two people fighting on the ground and walked over to break up what he thought was a fight between two people from the poker game. Mr. Sowards testified that he was punched and attacked so he ran back to his car and left. Mr. Sowards then left the parking lot and headed down Main Street while trying to call 911 on his cellphone. Mr. Sowards then struck another vehicle from behind as he was trying to dial 911. Police arrived at Blackhawk Grille and the accident scene to investigate. Mr. Sowards was taken to the hospital by ambulance where he was questioned by Sergeant D'Allesio and his clothing was taken by the officer.

During the September 2008 term of the Grand Jury, Mr. Sowards was indicted on one count of First-Degree Robbery and one count of Malicious Wounding. During the October 2010 term of the Grand Jury, Mr. Sowards was re-indicted on one count of First-Degree Robbery and one count of Malicious Assault. The initial 2010 indictment stated the alleged acts occurred in Putnam County, but the State later changed the indictment to state that the acts occurred in Cabell County. On February 24, 2012, Mr. Sowards was convicted by a jury of First-Degree Robbery and Malicious Assault. On April 3, 2012, Mr. Sowards was sentenced to forty (40) years for Count I

for First-Degree Robbery, and not less than two (2) nor more than ten (10) years for Count II for Malicious Assault to run consecutively with the sentence for Count I. Mr. Sowards was granted bond with home confinement restrictions during the appeal process.

On May 16, 2012, Mr. Sowards filed an appeal with the West Virginia Supreme Court of Appeals raising the issue of plain error regarding the Amended Indictment of 2010 in that the State exceeded its authority to amend and the amendment made was a matter of substance. Furthermore, Mr. Sowards argued that Mr. his sentence violated the proportionality principle contained in West Virginia Constitution, Article II, Section 5. On April 16, 2013, the West Virginia Supreme Court of Appeals issued a Memorandum Decision affirming the jury conviction and sentencing.

As indicated above, Mr. Sowards filed a Habeas Corpus Brief on or about March 8, 2021, alleging the following grounds for relief:

1. Mr. Sowards was denied Due Process rights guaranteed by the 5th Amendment, 6th Amendment, and 14th Amendment of the United States Constitution and Article 3 §10 of the West Virginia Constitution because of the inordinate delay of the trial of Mr. Sowards.
2. Mr. Sowards was denied Due Process rights guaranteed by the 5th Amendment and 14th Amendment of the United States Constitution and Article 3 §10 of the West Virginia Constitution because the Court refused to instruct the jury on the lesser included offense of malicious assault and presented an improper verdict form.
3. Mr. Sowards was denied Due Process rights guaranteed by the 5th Amendment, 6th Amendment, and 14th Amendment of the United States Constitution and Article 3 §10 of the West Virginia Constitution because of the evidentiary rulings by the Court.

4. Mr. Sowards was denied Due Process rights guaranteed by the 5th Amendment, 6th Amendment, and 14th Amendment of the United States Constitution and Article 3 §10 of the West Virginia Constitution because of ineffective assistance of counsel.
5. Mr. Sowards was denied rights guaranteed by the 8th Amendment and 5th Amendment of the United States Constitution and Article 3 §10 of the West Virginia Constitution due to failure of the Court to grant credit for post-conviction home confinement pending appeal in violation of the double jeopardy and due process protections.
6. Mr. Sowards was denied Due Process rights guaranteed by the 5th Amendment, 6th Amendment, and 14th Amendment of the United States Constitution and Article 3 §10 of the West Virginia Constitution due to cumulative error.

The Court hereby finds that a state and/or federal law was presented in each ground raised in Mr. Sowards' Habeas Corpus Brief.

With regard to Mr. Sowards' claim that he experienced an inordinate delay of his trial, the Court finds that Mr. Sowards' relief requested with regard to this issue should be refused. The evidence presented at the hearing indicated that Mr. Sowards and/or his counsel requested and/or agreed to many of the continuances that were granted in the underlying action. The Court does not believe that Mr. Sowards was prejudiced by the delay from the original indictment up until his trial.

With regard to Mr. Sowards' claim that the trial court erred it refused to instruct the jury on the lesser included offense of malicious assault and presented an improper verdict form, the Court finds that Mr. Sowards' relief requested with regard to this issue should be refused. The record reflects that there was ample evidence presented at trial supporting the jury instructions as

given and further there is nothing to suggest that the trial court abused its discretion in refusing to instruct the jury as requested by Mr. Sowards' trial counsel.

With regard to Mr. Sowards' claim that the trial court erred in its evidentiary findings, the Court finds that Mr. Sowards' relief requested with regard to this issue should be refused. There was not a showing the trial court abused its discretion in its rulings with regard to trial counsel's motion to dismiss based on violation of Mr. Sowards' right to speedy trial, trial counsel's motion to change venue, allowing Mr. Sowards' statement and clothes into evidence, and the Court's questioning of a witness.

With regard to Mr. Sowards' claim that there was ineffective assistance of counsel at trial, the Court finds that Mr. Sowards' relief requested with regard to this issue should be refused. Specifically, there was no evidence that Mr. Laishley's representation of Mr. Sowards was deficient under an objective standard of reasonableness and there is no evidence that but for his unprofessional errors that the outcome of the underlying trial would have been different. There, the Court finds that Mr. Sowards did not have ineffective assistance of counsel.

With regard to Mr. Sowards' claim that he should have been given credit for time served while he was on home confinement pending his post-conviction appeal, the Court finds that Mr. Sowards' relief requested with regard to this issue should be granted. The State did not oppose the granting of this request. Furthermore, the Court believes, even without the State's position, that Mr. Sowards should have been given credit for time served while on home confinement pending his post-conviction appeal. Mr. Sowards' terms and conditions for his home confinement encompassed, at a minimum, the mandatory statutory requirements enunciated in West Virginia Code §62-11B-5, and, as such, he should be given credit for time served during that time he was on home confinement from April 4, 2012 until June 2, 2013.

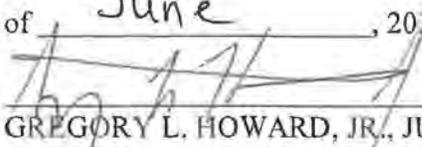
With regard to Mr. Sowards' claim that his conviction should be overturned due to cumulative error, the Court finds that Mr. Sowards' relief requested with regard to this issue should be refused. Except for the issue regarding time served while on home confinement, the Court does not believe that the evidence presented warrants the relief requested, and the Court reiterates its previous findings and conclusions with regard to all issues addressed in the Petition and at the hearing.

Based on the foregoing, it is, therefore, **ADJUDGED, ORDERED, and DECREED** that Mr. Sowards' Petition for Writ of Habeas Corpus is **GRANTED IN PART and DENIED IN PART.**

It is further **ADJUDGED, ORDERED, and DECREED** that the West Virginia Division of Corrections and Rehabilitation shall amend Mr. Sowards' time sheet by awarding him credit from April 3, 2012 until June 2, 2013.

This is a final order. The Clerk of this Court shall enter the foregoing order and send a certified copy to the following: Juston H. Moore, Esq. (Box #82); Jennifer Skragg Karr, Esq., Putnam County Prosecuting Attorney's Office, 12093 Winfield Road, Winfield, West Virginia 25213 (via first class mail); and the West Virginia Division of Corrections and Rehabilitation, 1409 Greenbrier Street, Charleston, WV 25311.

Entered this 11th day of June, 2021.

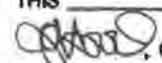

GREGORY L. HOWARD, JR., JUDGE

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON _____

GIVEN UNDER MY HAND AND SEAL OF SAID COURT

THIS _____


JEFFREY E. HOOD, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA