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

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Jeffrey Phipps,
Petitioner Below, Petitioner

v.) No. 22-0296 (Kanawha County 21-P-2)

Shawn Straughn, Superintendent,
Northern Correctional Facility,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Jeffrey T. Phipps appeals the Circuit Court of Kanawha County's March 24, 2022, order denying post-conviction habeas relief.[1] On appeal, the petitioner argues that the court erred by 1) denying his claims of ineffective assistance of counsel, 2) sentencing him to a term of imprisonment that is disproportionate to the offense, 3) improperly allowing experts to testify for the State, and 4) denying his habeas petition without a hearing. Upon our review, we determine oral argument is unnecessary and that a memorandum decision is appropriate. *See* W. Va. R. App. P. 21(c).

The petitioner was indicted for nineteen counts of first-degree sexual assault, five counts of first-degree sexual abuse and one count of displaying obscene material to a minor. Before trial, the petitioner moved to exclude the State's expert testimony regarding the victims' forensic interviews and sexual assault examinations, arguing there was no physical evidence to corroborate the experts' testimony. The circuit court denied this motion.

The evidence presented at trial showed that the petitioner cared for a wheelchair-bound woman, Sharon K., in her home. In November 2017, Tracy W. and her two children, E.W. and N.W., moved into the home. At some point, Tracy W.'s friend, Tiedra S., began staying at the house with them. In December 2017, the petitioner revealed to Tiedra S. that on multiple occasions he had woken up to find E.W. with either his mouth on the petitioner's penis or his hands inside the petitioner's pants. When Tracy W. was informed of this, she called the police, who scheduled

[1] The petitioner is self-represented. The respondent appears by Attorney General Patrick Morrisey and Assistant Attorney General Mary Beth Niday. The petitioner was previously incarcerated at Mount Olive Correctional Complex and identified the superintendent of that facility as the respondent, but he is now incarcerated at Northern Correctional Facility, at which Shawn Straughn is the superintendent. The appropriate public officer has been substituted pursuant to Rule 41 of the West Virginia Rules of Appellate Procedure. Initials are used where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e).

forensic interviews for E.W. and N.W. at the Child Advocacy Center. During their interviews, N.W. and E.W. disclosed very descriptive and graphic details about numerous instances of sexual assault and sexual abuse by the petitioner that involved anal and oral sex. After the children's interviews, the police obtained a search warrant for the residence, where they found a container of Vaseline and the petitioner's semen on the wall of his bedroom that corroborated E.W.'s disclosures that the petitioner used Vaseline during these sexual acts and would ejaculate on the wall next to his bed. The petitioner's defense was that Tracy W. coached the children in an effort to oust him from the home so that she could become a paid caregiver for Sharon K. The petitioner was convicted by a jury for all charges in the indictment and the court sentenced him to an aggregate term of 165 to 655 years in prison. We affirmed his convictions on direct appeal in *State v. Phipps*, No. 18-0967, 2020 WL 3408058 (W. Va. June 18, 2020) (memorandum decision).

In 2021, the petitioner filed a petition for a writ of habeas corpus with the circuit court. The court appointed counsel, and counsel filed an amended petition that asserted numerous grounds for relief, including ineffective assistance of counsel, disproportionate sentence, and error in admitting expert testimony offered by the State at trial. The court denied the petitioner's claims of ineffective assistance of counsel because he failed to allege that he was prejudiced by the alleged deficiencies, and some of his allegations were contradicted by the record. The court found the petitioner waived his argument regarding the proportionality of his sentence because he did not present this issue on direct appeal. Nevertheless, the court further found his sentence was proportional because it was within statutory limits. Finally, the court found the petitioner waived his challenge to the admissibility of the State's expert testimony because he did not present this issue on direct appeal. The petitioner appeals the court's order denying habeas relief and asserts four assignments of error.

When this Court reviews a circuit court's final order in a habeas 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, in part, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

In the petitioner's first assignment of error, he argues that the circuit court erred in denying his claim of ineffective assistance of counsel, where trial counsel allegedly failed to: interview witnesses, investigate the petitioner's claim of innocence, pursue evidence to impeach the credibility of State witnesses, develop a theory of defense, file a motion to suppress evidence found in the petitioner's bedroom, review sexually explicit pictures on the petitioner's cell phone that were admitted into evidence, pursue independent forensic evaluations of the victims and the petitioner, adequately voir dire potential jurors regarding their relationship with law enforcement, voir dire State experts, challenge the State experts' opinions and employ a defense expert, effectively cross-examine State witnesses, move to strike hearsay and opinion testimony advanced by State witnesses, move to strike prejudicial testimony under Rule 403 of the West Virginia Rules of Evidence, and introduce mitigating evidence at sentencing.

To establish a claim of ineffective assistance of counsel, the petitioner must prove: "(1) [c]ounsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceedings would have been different." Syl. Pt. 5, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "Failure to meet the burden of proof imposed by either part of the *Strickland*/*Miller* test is fatal to a habeas petitioner's claim." *State ex rel. Vernatter v. Warden*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999) (citing *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 321, 465 S.E.2d 416, 423 (1995)). Before this Court, the petitioner does not explain how, "but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, in part, *Miller*, 194 W. Va. at 3, 459 S.E.2d at 114. In other words, he does not explain how he was prejudiced by any of trial counsel's alleged deficiencies; he merely presents a litany of complaints. Moreover, the petitioner does not explain how the lower court erred in concluding that the trial record contradicted petitioner's assertions of ineffective assistance of counsel. "On 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). For these reasons, the petitioner has failed to demonstrate error in the court's denial of habeas relief on his ineffective assistance of counsel claim, and we cannot find the court abused its discretion in denying these claims.

Next, the petitioner argues that his sentence violates the principle of proportionality as set forth in the Eighth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution. The circuit court denied relief on this issue, finding that it was waived because it was not "advanced on direct appeal." Syl. Pt. 1, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972). We have held that "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Impermissible factors include "race, sex, national origin, creed, religion, and socioeconomic status . . . ." *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Oct. 11, 2019) (memorandum decision) (citation omitted). We have also instructed that "[w]hile our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). The petitioner does not allege that the circuit court considered any impermissible factors, and he is not sentenced to a life recidivist sentence. Because the petitioner's sentences were within statutory limits,[2] we find no error in the circuit court's conclusion that the petitioner's proportionality challenge lacks merit. *See State v. Allen*, 208 W. Va. 144, 156, 539 S.E.2d 87, 99 (1999) (declining to review under proportionality principles "[b]ecause this case involves neither the possibility of unlimited sentences nor a life recidivist statute").

In the petitioner's third assignment of error, he argues the State's expert testimony at trial regarding the victims' forensic interviews and sexual assault examinations was irrelevant and

[2] *See* W. Va. Code §§ 61-8B-3(c) (providing for twenty-five to one hundred years of imprisonment for first-degree sexual assault), 61-8B-7(c) (providing for five to twenty-five years of imprisonment for first-degree sexual abuse), 61-8A-2(a) (providing for up to five years of imprisonment for displaying obscene material to a minor).

substantially more prejudicial than probative because the experts found no physical evidence of sexual abuse or assault to corroborate the victims' disclosures. *See* W. Va. R. Evid. 401, 403. The petitioner further alleged that the circuit court abused its "gatekeeping" function as described in *Daubert*[3] by allowing the State's experts to vouch for the credibility of the victims. The petitioner has failed to assert error in the circuit court's conclusion that the petitioner waived this claim by failing to advance it in his direct appeal, let alone establish error in that ruling. *See* Syl. Pt. 1, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972) (holding that "there is a rebuttable presumption" that a habeas petitioner waived any ground that could have been raised on direct appeal but was not). Moreover, we have held that "[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). For the additional reason that the petitioner's contentions in this assignment of error amount to ordinary trial error, the circuit court did not err in declining to address them. *See Thompson v. Ballard*, 229 W. Va. 263, 269-70, 728 S.E.2d 147, 153-54 (2012) (concluding that a petitioner's claim that scientific evidence admitted at trial failed to meet the standard articulated in *Daubert* did not amount to error of a constitutional magnitude and, therefore, was not cognizable in habeas).

Finally, in the petitioner's fourth assignment of error, he argues that the circuit court erred when it denied his habeas petition without a hearing. We have explained that "[i]t is evident from a reading of W. Va. Code § 53-4A-7(a) that a petitioner for habeas corpus relief is not entitled, as a matter of right, to a full evidentiary hearing in every proceeding instituted under the provisions of the post-conviction habeas corpus act." *Gibson v. Dale*, 173 W. Va. 681, 688, 319 S.E.2d 806, 812-13 (1984) (footnote omitted). When the court entered its order denying habeas relief, it conducted a "thorough examination of the underlying criminal file, the amended petition and the response" and determined "that an evidentiary hearing is not necessary to decide this matter." After doing so, the court found that "the petitioner has failed to carry the burden as to any of his assertions and that the amended petition lacks merit." After a careful review of the court's findings of fact and conclusions of law, we find the court did not err when it ruled upon the petition without a hearing.

For the foregoing reasons, we affirm the Circuit Court of Kanawha County's March 24, 2022, order denying habeas relief.

Affirmed.

ISSUED: August 27, 2024

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

[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *see* Syl. Pt. 4, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995) (explaining the court's "gatekeeper" function when ruling upon the admissibility of scientific evidence).