

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent,

v.) No. 23-18 (Greenbrier County CC-13-2021-F-22)

Richard A. Kavazanjian,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Richard A. Kavazanjian appeals the December 19, 2022, order of the Circuit Court of Greenbrier County resentencing him for the purposes of appeal and denying his motion for reconsideration of his sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure.¹ On appeal, the petitioner argues that he was denied effective assistance of counsel. 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).

In April 2021, the petitioner was indicted for two counts of failing to register as a sex offender or to provide notice of registration changes. In October 2021, the petitioner pled guilty to one count, and the State agreed to dismiss the other count. Before accepting the petitioner's guilty plea, the circuit court found him to be competent to enter a plea and aware of the nature of the charges, the penalty involved, and the rights he waived by pleading guilty. The court also found that the petitioner voluntarily, knowingly, and intelligently pled guilty. Further, the court found that the petitioner's attorney was competent in criminal matters and the petitioner was satisfied with his attorney's representation. In February 2022, the court sentenced the petitioner to one to five years of imprisonment. In June 2022, the petitioner's counsel filed a Rule 35(b) motion for sentence reduction and a motion to withdraw as counsel. After appointing new counsel, the court denied the petitioner's Rule 35(b) motion and resentenced him for the purposes of appeal by order dated December 19, 2022. The petitioner appeals from this order.

On appeal, the petitioner presents one assignment of error, arguing that he was denied effective assistance of counsel, which caused him to plead guilty instead of going to trial. Specifically, the petitioner argues that his attorney did not review discovery with him or file an appeal despite being instructed to do so. The petitioner also argues that his attorney failed to properly assess his competency to enter a guilty plea.

¹ Petitioner appears by counsel Kristopher Faerber. Respondent appears by Attorney General Patrick Morrissey and Deputy Attorney General Andrea Nease Proper.

The petitioner improperly presents his ineffective assistance of counsel claim for the first time on direct appeal. “Ineffective assistance claims raised on direct appeal are presumptively subject to dismissal. . . . Such claims should be raised in a collateral proceeding rather than on direct appeal to promote development of a factual record sufficient for effective review.” *State v. Miller*, 197 W. Va. 588, 611, 476 S.E.2d 535, 558 (1996); *City of Philippi v. Weaver*, 208 W. Va. 346, 351, 540 S.E.2d 563, 568 (2000) (“This Court has consistently held that claims of ineffective assistance of counsel are not properly raised on direct appeal.”). Further, “[w]hen the critical component of a fully developed record is missing, an ineffective assistance claim is all but guaranteed to be denied due to the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”” *State v. Frye*, 221 W. Va. 154, 157, 650 S.E.2d 574, 577 (2006) (quoting *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114 (1995), and *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). The petitioner has not filed a petition for a writ of habeas corpus, and there has been no omnibus habeas corpus hearing to develop the petitioner’s claim of ineffective assistance of counsel. Thus, the record before this Court is insufficient to review this claim.

Given the applicable standard and the strong presumption in cases alleging ineffective assistance of counsel, we conclude, as in *Miller*, that “we intelligently cannot determine the merits of this ineffective assistance claim without an adequate record giving trial counsel the courtesy of being able to explain his trial actions.” *Id.* at 17, 459 S.E.2d at 128. Because we are not deciding the issue of ineffective assistance of counsel on the merits, there is no final adjudication of petitioner’s claim of ineffective assistance of counsel and petitioner is not barred from seeking habeas corpus relief on this issue in circuit court. W. Va. Code § 53-4A-1; *Frye*, 221 W. Va. at 158, 650 S.E.2d at 578.

Based on the foregoing, this Court affirms the Circuit Court of Greenbrier County’s December 19, 2022, resentencing order.

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