FILED
August 27, 2024
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

John Moore Sr.,
Petitioner Below, Respondent

v.) No. 23-78 (Taylor County 21-C-17)

Brian Lanham, Superintendent,
Tygart Valley Regional Jail,
Respondent Below, Petitioner

MEMORANDUM DECISION

Petitioner John Moore Sr. appeals the Circuit Court of Taylor County's January 9, 2023, order denying his petition for a writ of habeas corpus.[1] Here, the petitioner argues that the circuit court erred in finding that his sentence was not disproportionate to the crime committed and in failing to hold an omnibus hearing on the issue of ineffective assistance of counsel. Upon our review, finding no substantial question of law and no prejudicial error, we determine oral argument is unnecessary and that a memorandum decision affirming the circuit court order is appropriate. *See* W. Va. R. App. P. 21(c).

In April 2017, the petitioner was indicted by the Taylor County Grand Jury on one count of fleeing from an officer in a vehicle while under the influence of alcohol or a controlled substance. The petitioner posted bond and was released under the condition that his bond supervision be monitored through the local community corrections program. Following his arraignment on May 1, 2017, the petitioner tested positive for methamphetamine, and his bond was revoked. The petitioner's bond was reinstated on May 16, 2017, and he was again supervised through the local community corrections program. The petitioner continued to test positive for controlled substances, and it was alleged that he had been providing drugs to other participants of the community corrections program. As a result, a jail commitment order was issued on October 19, 2017.

In January 2018, the petitioner and the State entered into a plea agreement wherein the petitioner agreed to enter an *Alford/Kennedy* plea to the sole offense contained in the indictment.[2]

[1] The petitioner appears by counsel Ira Richardson. The respondent appears by Attorney General Patrick Morrisey and Deputy Attorney General Andrea Nease Proper.

[2] *See* Syl. Pt. 1, *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987) ("An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that

In exchange, the State agreed to forego prosecuting the petitioner for any offenses pertaining to delivery of a controlled substance of which the State was currently aware. The State also agreed to recommend that the petitioner's sentence be suspended and that he be placed in the community corrections program to complete substance abuse treatment. The plea agreement correctly set forth that the sentence for a conviction of fleeing from an officer in a vehicle while under the influence of alcohol or a controlled substance was an indeterminate term of not less than three nor more than ten years of imprisonment pursuant to West Virginia Code § 61-5-17(j). Accompanying the plea agreement was a document titled "Defendant's Statement in Support of Plea of Guilty" in which the petitioner indicated that he was aware that the sentence for the crime charged was three to ten years of imprisonment. However, in another form, "Defendant's Petition to Enter Plea of Guilty," the petitioner indicated that trial counsel had advised him that the maximum penalty for the offense charged in the indictment was one to five years of imprisonment.

At the plea hearing held on January 23, 2018, the circuit court conducted a plea colloquy in which the petitioner acknowledged that the possible penalty for the crime was three to ten years of imprisonment. The circuit court accepted the petitioner's plea and sentenced him to three to ten years of imprisonment. In accordance with the plea agreement, the circuit court held the petitioner's sentence in abeyance, placed him in the community corrections program and ordered him to complete in-patient substance abuse treatment.

On May 12, 2020, the director of the local community corrections program sent a letter to the circuit court advising that the petitioner had "struggled with drug and alcohol use since initial intake" and "was revoked for drug use as well as driving under the influence" in November 2019. According to the director, the petitioner had failed to report to the community corrections program since March 9, 2020, and given the length of time since his last contact, the director recommended a capias be issued for his arrest. Accordingly, the petitioner was arrested on July 18, 2020, and his three-to-ten-year sentence was reinstated on September 30, 2020. The petitioner did not file a direct appeal.

On June 3, 2021, the petitioner filed a self-represented petition for a writ of habeas corpus. The circuit court appointed counsel, who filed an amended petition raising twenty-one grounds for relief. Relevant to this appeal, the petitioner argued that his sentence was disproportionate to the crime committed and that his trial counsel was ineffective for various reasons, including that trial counsel erroneously informed the petitioner that the maximum penalty for the crime charged was one to five years of imprisonment.

By order dated January 9, 2023, the circuit court summarily denied the petitioner habeas relief. The petitioner now appeals from the circuit court's order denying him habeas relief, and in our review of that order, "[w]e 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).

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his interests require a guilty plea and the record supports the conclusion that a jury could convict him."); *see also North Carolina v. Alford*, 400 U.S. 25 (1970).

In his first assignment of error, the petitioner argues that the circuit court erred in finding that his sentence was not so disproportionate as to violate the proportionality principle in Article III, Section 5 of the West Virginia Constitution. According to the petitioner, he "does not contend that the sentence violated statutory provisions" but, rather, argues "that the statutory provisions are inadequate." Per the petitioner, West Virginia Code § 61-5-17(j) does not take into account the varying degrees of factual scenarios that can constitute fleeing from an officer and that "driving home while slightly above the legal limit . . . and 'accelerating' up-hill in a 40 year old truck should receive a different sentence than someone that is clearly snockered and takes the law on a 10 mile high-speed chase through hill and dale." Because the petitioner was, allegedly, only 100 yards from his home when the officer initiated a stop and because the petitioner was arguably accelerating simply to crest the hill to his home, he contends that his sentence shocks the conscience and is disproportionate to the crime committed. Moreover, the petitioner contends that his sentence is disproportionate when viewed in light of the penalties prescribed for more "heinous" crimes, such as the three-to-fifteen-year penalty for voluntary manslaughter. We disagree.

As noted above, the circuit court imposed the sentence of three to ten years of imprisonment, which is the sentence specified by West Virginia Code § 61-5-17(j) for the petitioner's crime of fleeing from an officer in a vehicle while under the influence. Our analysis of this issue is guided by Syllabus Point 4 of *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982), which provides 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." 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). Here, the petitioner admits that his three-to-ten-year sentence was in accordance with statutory provisions, and he does not allege that the court considered any impermissible factors. As such, appellate review is not available.

The petitioner next argues that the circuit court erred in summarily dismissing his habeas petition without holding an omnibus hearing so that he could develop his claim of ineffective assistance of counsel. The petitioner claims that he needed to develop the facts surrounding how trial counsel had improperly informed him as to the potential penalty for the crime charged and how this error, amongst others, led to him mistakenly taking the plea deal. The petitioner claims that the paperwork showed that trial counsel had advised the petitioner of two different potential penalties and that given the inconsistency, the circuit court should have held a hearing to develop the ineffectiveness of trial counsel's assistance. Again, we disagree.

We have held that a circuit court may summarily deny unsupported claims without holding an evidentiary hearing if it determines the petition submitted fails to show grounds 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 Gibson v. Dale*, 173 W. Va. 681, 689, 319 S.E.2d 806, 814 (1984) ("If the facts were sufficiently developed at or before trial so that the court can rule on the issue presented without further factual development, the court may, in its discretion, decline to conduct an evidentiary hearing during the

habeas proceeding and may rule on the merits of the issues by reference to the facts demonstrated on the record."); W. Va. Code § 53-4A-7(a) (discussing the circuit court's role in determining whether there is cause to believe the petitioner may be entitled to some relief). Here, the circuit court determined that the petitioner's claim of ineffective assistance of counsel could be addressed based on the record and that an evidentiary hearing was not necessary. Specifically, the court found that while the petitioner had indicated that his potential sentence was one to five years in his Petition to Enter Plea of Guilty, the correct sentence was contained in both the Defendant's Statement in Support of Plea of Guilty and in the signed plea agreement. Moreover, during the plea colloquy, the court questioned the petitioner regarding his understanding of the sentence, and the petitioner acknowledged that the potential sentence, should he not complete his in-patient treatment and participate in the community corrections program, was three to ten years of imprisonment. The court concluded that it was clear that the petitioner understood the correct sentence for the charge. Given this finding that the petitioner was advised of the correct sentence, the petitioner's claim of ineffective assistance of counsel is without merit. *See* Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) ("In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel'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."). Accordingly, under the circumstances of this case, we cannot say that the circuit court abused its discretion in summarily denying the petition.

For the reasons stated above, this Court affirms the January 9, 2023, final order of the Circuit Court of Taylor County.

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