

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 23-397 (Kanawha County 19-F-565)

Joshua James Harrison,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Joshua James Harrison appeals the May 23, 2023, order entered by the Circuit Court of Kanawha County denying his motion for a copy of his criminal case file and grand jury transcript.¹ On appeal, the petitioner argues that the court erred when it denied his request for a copy of the grand jury transcript, denied his request for a copy of the case file from the West Virginia Office of the Chief Medical Examiner, and further argues that he has been denied right to appeal his conviction because his counsel refused to file an appeal. Upon our review, finding no substantial question of law and no prejudicial error, we determine oral argument is unnecessary and that a memorandum decision is appropriate. *See* W. Va. R. App. P. 21(c).

In December 2021, the petitioner, who was represented by counsel, pled guilty to first-degree murder, and the circuit court sentenced him to life with mercy. The petitioner did not file a direct appeal of his guilty plea and sentence. In December 2022, the self-represented petitioner filed a motion to obtain records from his criminal case for the purpose of filing a petition for a writ of habeas corpus. In response, the circuit clerk sent him a copy of his entire criminal case file with a letter advising him that there were no transcripts in the circuit court file, and to receive transcripts, he must file a transcript request form with this Court. In February 2023, the petitioner filed a second motion to obtain records from his criminal case. The second motion added that the petitioner sought a transcript from the grand jury proceedings in his case, which was not included in the records previously sent by the circuit clerk. The circuit clerk responded by sending the petitioner a copy of the docket sheet from his case with a letter reiterating that there were no transcripts in the court file and informing him that “to receive a copy of a transcript, you must make your request, in writing, to the Supreme Court of Appeals.”

¹ The petitioner is self-represented. The State appears by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease Proper. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel.

In May 2023, the circuit court entered an order denying the petitioner's February 2023 motion as moot because the circuit clerk sent him a copy of his case file in January 2023. The court also denied the petitioner's request for the grand jury transcript for three reasons. First, the petitioner did not demonstrate, or even argue, that his request for the grand jury transcript met any of the exceptions to the general rule of grand jury secrecy. Second, the petitioner did not justify his request for the grand jury transcript by demonstrating, or alleging, that the State committed willful or intentional fraud during the grand jury proceeding.² And third, the petitioner "failed to timely raise objections to the indictment." The petitioner now appeals the circuit court's order denying his requests for records.

When "reviewing challenges to the findings and conclusions of the circuit court We review the final order and the ultimate disposition under an abuse of discretion standard," factual findings are reviewed for clear error, and questions of law are reviewed de novo. Syl. Pt. 2, in part, *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997); accord Syl. Pt. 1, in part, *State v. Schermerhorn*, 211 W. Va. 376, 566 S.E.2d 263 (2002).

First, the petitioner argues that the circuit court erred in denying his motion to disclose the transcript of the grand jury proceedings in his case because it "may contain challengeable legal issues" for a future habeas petition, and he is entitled to the grand jury transcript pursuant to Rule 26.2(a) of the West Virginia Rules of Criminal Procedure.³ We have held that an indigent criminal defendant is entitled to "a free copy of the transcript of the proceedings against him or her, and to all other matters of record, [but this] does not include copies of any transcripts or other documents or matters of record that are protected from disclosure" Syl. Pt. 2, in part, *State ex rel. Tackett v. Poling*, 243 W. Va. 266, 843 S.E.2d 518 (2020). Rule 6(e)(2) of the West Virginia Rules of Criminal Procedure establishes a general rule of secrecy surrounding grand jury proceedings and provides, in relevant part, that no one shall "disclose matters occurring before the grand jury, except as otherwise provided for in these rules." Rule 6(e)(3) of the West Virginia Rules of Criminal Procedure details the exceptions to this general rule of secrecy for grand jury proceedings, and the petitioner has not shown that any of those exceptions apply to his request.⁴

² See Syl., *Barker v. Fox*, 160 W. Va. 749, 238 S.E.2d 235 (1977) (holding that "[e]xcept for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency.").

³ Rule 26.2(a) of the West Virginia Rules of Criminal Procedure provides that

[a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney, as the case may be, to produce for the examination and use of the moving party any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

⁴ Matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be disclosed to: "an attorney for the state for use in the performance of such attorney's duty;" and "such official personnel as are deemed necessary by an attorney for the state

Further, to the extent that the petitioner requests the grand jury transcript to gather evidence for a future habeas petition, this Court has held that that “[a]n inmate may not engage in discovery in relation to a post-conviction habeas corpus proceeding prior to the filing of his or her petition[.]” *Tackett*, 243 W. Va. at 267, 843 S.E.2d at 520, Syl. Pt. 3, in part. Additionally, Rule 26.2 of the West Virginia Rules of Criminal Procedure “creates no right to production of statements of witnesses until the witness has testified on direct examination[.]” *State v. Watson*, 173 W. Va. 553, 560, 318 S.E.2d 603, 610 (1984). Because the petitioner did not go to trial, Rule 26.2 is inapplicable and provides the petitioner with no relief. Thus, the circuit court did not err when it denied the petitioner’s request for a copy of the grand jury transcript.⁵

Second, the petitioner argues that the circuit court erred in failing to require the circuit clerk to send him a copy of the decedent’s case file from the West Virginia Office of the Chief Medical Examiner and claims that he is entitled to this information because “the cause of death is a material issue” in his future habeas case. But the petitioner has not demonstrated that the medical examiner’s records are the file maintained by the circuit clerk. *See* W. Va. Code § 61-12-10(d) (providing that the Office of the Chief Medical Examiner shall provide copies of records under certain circumstances). And as stated above, the petitioner cannot pursue a discovery request for his future habeas case before filing the habeas petition. *Tackett*, 243 W. Va. at 267, 843 S.E.2d at 520, Syl. Pt. 3, in part. Thus, the circuit court did not err in denying this request.

Third, the petitioner argues, for the first time on appeal, that his counsel informed him that he had no right to appeal a guilty plea and refused to file an appeal when requested to do so. Our general rule is that nonjurisdictional questions raised for the first time on appeal will not be considered. *See* Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958) (“This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.”). Nevertheless, “[a] constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case.” Syl. Pt. 2, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005). Here, the petitioner’s claim implicates the advice

to assist an attorney for the state in the performance of such attorney’s duty to enforce criminal law.” W. Va. R. Crim. P. 6(e)(3)(A). A court may also order disclosure of grand jury matters: “when so directed by a court preliminarily to or in connection with a judicial proceeding;” upon a request of a defendant who shows “that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;” “when the disclosure is made by an attorney for the state to another grand jury;” or “at the request of an attorney for the state, upon a showing that such matters may disclose a violation of federal criminal law or of the law of another state, to an appropriate official of the federal government of such other state for the purposes of enforcing such law.” W. Va. R. Crim. P. 6(e)(3)(C).

⁵ The petitioner also complains that he did not receive a copy of his criminal case court file, yet the appendix record reflects that the circuit clerk sent a copy of his entire file to him on December 12, 2022. The petitioner has not offered any evidence challenging the record on this point. The petitioner additionally seeks copies of his attorney’s billing records, but to the extent that the petitioner seeks material that is not already within his court file in support of his future habeas petition, he must first file his petition and then file a motion for discovery under Rule 7 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. *See id.*

given by his counsel, but a record of that advice has not been fully developed and the petitioner's argument on this point is not dispositive. Accordingly, we decline to address the merits of this claim.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: July 30, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV