

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Gary Mullins v. Jim Rubenstein,
Commissioner, West Virginia Division of Corrections

Mullins · No. No. 16-0046 · Decided March 10, 2017

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the denial of Gary Mullins’s amended petition for a writ of habeas corpus. The court held that claims previously adjudicated on direct appeal were not reviewable in habeas proceedings and that Mullins failed to establish ineffective assistance of trial counsel under the Strickland/Miller standard.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Per Curiam; Chief Justice Allen H. Loughry II; Justice Robin Jean Davis; Justice Margaret L. Workman; Justice Menis E. Ketchum; Justice Elizabeth D. Walker
JURISDICTION	West Virginia
DECIDED	March 10, 2017
DOCKET	No. 16-0046
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed the Circuit Court of Kanawha County's denial of his amended petition for a writ of habeas corpus.
STANDARD OF REVIEW	In a habeas corpus action, the final order and ultimate disposition are reviewed for abuse of discretion, underlying factual findings for clear error, and questions of law de novo.
PRECEDENTIAL VALUE	unpublished memorandum decision
PARTIES	State of West Virginia ex rel. Gary Mullins v. Jim Rubenstein, Commissioner, West Virginia Division of Corrections

TOPICS

- state post-conviction relief
- habeas corpus
- ineffective assistance
- appellate procedure
- evidence

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether claims previously raised and finally adjudicated on direct appeal could be relitigated in a post-conviction habeas proceeding.
2. Whether trial counsel rendered ineffective assistance by failing to investigate evidence, call witnesses, cross-examine the victim concerning an alleged inconsistency, and undertake other asserted trial and post-trial actions.
3. Whether inadequately developed arguments concerning additional alleged instances of ineffective assistance should be considered on appeal.

HOLDINGS

1. Claims that were fully and finally adjudicated in the petitioner's criminal trial and direct appeal are not reviewable again in a post-conviction habeas proceeding.
2. Counsel's decisions not to pursue unavailable surveillance footage, seek out other shoppers, or call the bank employee and petitioner's sister were not deficient under the objective standard of reasonableness.
3. Counsel's decision not to cross-examine the elderly victim about an alleged discrepancy in whether Mullins entered the victim's home was not objectively deficient.
4. Arguments mentioned only in passing and unsupported by pertinent authority or developed factual and legal analysis are deemed abandoned and will not be considered on appeal.

KEY QUOTATIONS

“Judicial scrutiny of counsel’s performance must be highly deferential” (at 3)

“What defense to carry to the jury, what witnesses to call, and what method of presentation to use is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.” (at 4)

“Although we liberally construe briefs in determining issues presented for review, issues which are . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.” (at 6)

FACTUAL BACKGROUND

A jury convicted Gary Mullins of kidnapping after evidence showed that he entered eighty-four-year-old George Jacobs's vehicle, demanded money, grabbed Jacobs's arm, and compelled him to drive home and obtain money. Mullins was acquitted of second-degree robbery and fraudulent schemes and received a twenty-five-year determinate sentence for kidnapping. In his habeas proceeding, Mullins alleged that trial counsel inadequately investigated the case, failed to call witnesses, inadequately cross-examined Jacobs, and committed other errors.

PROCEDURAL HISTORY

A jury convicted Mullins of kidnapping and acquitted him of second-degree robbery and fraudulent schemes. After this Court affirmed the kidnapping conviction on direct appeal, Mullins filed an amended habeas petition alleging ineffective assistance of counsel and repeating the errors raised on direct appeal. Following an omnibus hearing, the circuit court held that six claims had been fully and finally litigated and rejected the ineffective-assistance claim under Strickland and Miller. The Supreme Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Mullins, No. 12-1460 (W. Va. Supreme Court, Oct. 18, 2013) (memorandum decision)
- Mathena v. Haines, 219 W. Va. 417, 633 S.E.2d 771 (2006)
- Strickland v. Washington, 466 U.S. 668 (1984)
- State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)
- Bowman v. Leverette, 169 W. Va. 589, 289 S.E.2d 435 (1982)
- State ex rel. Daniel v. Legursky, 195 W. Va. 314, 465 S.E.2d 416 (1995)
- Hutchins v. Garrison, 724 F.2d 1425 (4th Cir. 1983), cert. denied, 464 U.S. 1065 (1984)
- State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996)
- State v. Lilly, 194 W. Va. 595, 461 S.E.2d 101 (1995)
- State, Department of Health v. Robert Morris N., 195 W. Va. 759, 466 S.E.2d 827 (1995)
- United States v. Dunkel, 927 F.2d 955 (7th Cir. 1991)
- Ohio Cellular RSA Ltd. Partnership v. Board of Public Works of West Virginia, 198 W. Va. 416, 481 S.E.2d 722 (1996)