

## SUPREME COURT OF APPEALS OF WEST VIRGINIA

# Thomas Shrader v. State of West Virginia and McDowell County Circuit Court

No. 12-0982 (W. Va. May 17, 2013) · No. 12-0982 · Decided May 17, 2013

### SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the denial of Thomas Shrader’s petition for habeas corpus or, alternatively, coram nobis. The court held that res judicata barred the claims because Shrader had prior opportunities to challenge his convictions and found no error in the circuit court’s decision.

### CASE DETAILS

|                       |                                                                                                                                                                           |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Appeals of West Virginia                                                                                                                                 |
| WRITING FOR THE COURT | Chief Justice Brent D. Benjamin; Justice Robin Jean Davis; Justice Margaret L. Workman; Justice Menis E. Ketchum; Justice Allen H. Loughry II                             |
| JURISDICTION          | West Virginia                                                                                                                                                             |
| DECIDED               | May 17, 2013                                                                                                                                                              |
| DOCKET                | 12-0982                                                                                                                                                                   |
| DISPOSITION           | affirmed                                                                                                                                                                  |
| PROCEDURAL POSTURE    | Petitioner appealed the McDowell County Circuit Court's denial of his petition for a writ of habeas corpus or, alternatively, coram nobis.                                |
| STANDARD OF REVIEW    | The Court considered the applicable standard of review, the parties' briefs, and the record, and found no substantial question of law or prejudicial error.               |
| PRECEDENTIAL VALUE    | Memorandum decision issued under West Virginia Rule of Appellate Procedure 21; the opinion states that no substantial question of law or prejudicial error was presented. |
| PARTIES               | Thomas Shrader v. State of West Virginia, McDowell County Circuit Court                                                                                                   |

### TOPICS

state post-conviction relief

successive petitions

habeas corpus

appellate procedure

criminal procedure

## PRACTICE AREAS

post-conviction relief

criminal procedure

appellate procedure

## QUESTIONS PRESENTED

1. Whether res judicata and prior habeas proceedings barred Shrader's successive post-conviction petition.
2. Whether the alleged changes in indictment law qualified for the exception to res judicata for favorable, retroactively applicable changes in law.
3. Whether the indictments for murder and unlawful wounding were legally defective.
4. Whether Shrader was entitled to relief through coram nobis or on his ineffective-assistance claim.

## HOLDINGS

1. Res judicata barred Shrader's third post-conviction petition because he had prior habeas proceedings and was required to raise all matters known, or discoverable with reasonable diligence, in those proceedings.
2. Shrader did not establish that any favorable change in law applied retroactively so as to avoid res judicata.
3. The indictments were not shown to be defective: a West Virginia murder indictment need not specify first- or second-degree murder, and the unlawful-wounding indictment did not transpose the names as Shrader claimed.
4. The Court affirmed denial of relief through coram nobis, without recognizing a basis for granting that extraordinary remedy on Shrader's claims.

## KEY QUOTATIONS

*"Therefore, after careful consideration, this Court concludes that the doctrine of res judicata bars the instant petition and that the circuit court did not err in denying it."* (at 3)

*"For the foregoing reasons, we find no error in the decision of the Circuit Court of McDowell County and affirm its order, entered May 11, 2012, denying the petition for a writ of habeas corpus or, in the alternative, coram nobis."* (at 4)

## FACTUAL BACKGROUND

In 1976, Shrader pleaded guilty to two murder counts and to unlawful wounding, receiving two concurrent life sentences with mercy and a concurrent twelve-month jail sentence. He received habeas hearings in 1976 and 1984, and he later completed his West Virginia parole in 1999. In 2011, while incarcerated in federal prison on a separate firearm conviction, he filed another state petition challenging his pleas, indictments, changes in the law, and trial counsel's effectiveness.

## PROCEDURAL HISTORY

Shrader pleaded guilty in 1976 to two counts of first-degree murder and one reduced count of unlawful wounding and received concurrent sentences. His earlier habeas proceedings in 1976 and 1984 were unsuccessful, and a later motion for sentence reduction was also denied. After filing a third post-conviction

petition in 2011, the circuit court denied relief, concluding that the petition was moot, that the claims had been finally adjudicated or waived, and that the substantive claims lacked merit. The Supreme Court of Appeals affirmed.

#### DISPOSITION

affirmed

#### CASES CITED

- State ex rel. Richey v. Hill, 216 W. Va. 155, 603 S.E.2d 177 (2004)
- United States v. Mayer, 235 U.S. 55 (1914)
- Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981)
- State ex rel. Combs v. Boles, 151 W. Va. 194, 151 S.E.2d 115 (1966)
- State v. Schnelle, 24 W. Va. 767 (1884)

#### OPINION

##### PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS Thomas Shrader, FILED Petitioner Below, Petitioner May 17, 2013 RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS vs.) No. 12-0982 (McDowell County 11-C-186) OF WEST VIRGINIA State of West Virginia and McDowell County Circuit Court, Respondents Below, Respondents MEMORANDUM DECISION Petitioner Thomas Shrader, pro se, appeals the order of the Circuit Court of McDowell County, entered May 11, 2012, denying his petition for a writ of habeas corpus or, in the alternative, coram nobis.

Respondent State of West Virginia, by Andrew D. Mendelson, its attorney, filed a summary response to which petitioner filed a reply. The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error.

For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure. In 1975, petitioner was charged in Nos. 75-8-3, 75-8-4, and 75-8-19. In Nos. 75-8-3 and -4, petitioner was charged with murder.

In No. 75-8-19, petitioner was charged with malicious wounding. On January 20, 1976, petitioner pled guilty, in the first degree, on the two counts of murder and pled guilty to the reduced charge of unlawful wounding.

The circuit court imposed two life sentences, with mercy, along with a twelve-month sentence in jail on the unlawful wounding conviction. The sentences were concurrent. Petitioner subsequently filed a petition for a writ of habeas corpus and was provided with a hearing in June of 1976, where he states that he was represented by appointed counsel. Habeas relief was denied.

In 1984, petitioner was provided with an omnibus habeas corpus hearing after which relief was again denied.<sup>1</sup> In its May 11, 2012 order denying his instant petition, the circuit court stated that petitioner also filed a motion for a reduction of sentence in 1989, which was denied by an order entered March 27, 1990.

In the order denying the motion, the circuit court stated that “review of the relevant records indicates that the defendant had counsel, understood the sentencing procedure, and the content of the sentencing procedure.”<sup>1</sup> Petitioner was released on parole on December 23, 1993.

In 1999, petitioner completed his parole. In June of 2010, petitioner was charged by a federal grand jury of being a felon in possession of a firearm. Subsequently, petitioner was found guilty of constructive possession of firearms. Petitioner was sentenced under the Armed Career Criminal Act to 235 months in federal prison with five years of probation. Petitioner’s record of three violent felonies allowed for this sentence to be imposed.

Petitioner is currently incarcerated at United States Penitentiary-Lompoc in Lompoc, California. On October 11, 2011, petitioner filed a petition for a writ of habeas corpus or, in the alternative, coram nobis in the circuit court. Petitioner alleged the following grounds for relief: (1) petitioner believed in 1976 that he was pleading guilty to two felonies and one misdemeanor, not to three felonies;<sup>2</sup> (2) there have been changes in the law since 1976 favorable to petitioner; (3) the indictments against petitioner in Nos. 75-8-3, 75-8-4, and 75-8-19 were fatally flawed; and (4) ineffective assistance of trial counsel.

In its order entered May 11, 2012, the circuit court denied the petition. After addressing petitioner’s various claims, the circuit court concluded as follows: This Court finds that [petitioner]’s Petition for Habeas Corpus fails for many reasons.

The most important reason that [petitioner]’s Habeas Petition fails is because this Court lacks jurisdiction to hear the case. [Petitioner]’s Habeas Petition is moot. He has served his time and been paroled and discharged from his parole for the crimes he committed against the [S]tate of West Virginia. He is no longer in the [S]tate of West Virginia’s custody, he is a federal prisoner in the [S]tate of California.[<sup>3</sup>] [Petitioner]’s Habeas Petition also fails because this Court finds that all the issues involved in his case have been finally<sup>2</sup> Unlawful wounding is a felony under West Virginia Code § 61-2-9.

Petitioner alleges that he thought he was pleading to a misdemeanor. However, as the State notes, at the plea hearing, the circuit court asked petitioner, “You understand the consequences of your

pleas?” Petitioner answered, “Yes, sir, your Honor. I do.”<sup>3</sup> While it is an open question in West Virginia whether convicts on probation or parole may seek relief in habeas corpus, petitioner clearly may not do so because he completed his parole in the state system in 1999.

However, even though *coram nobis* no longer exists in purely civil cases, “it may still be available in a post-conviction context when the petitioner is not incarcerated.” *State ex rel. Richey v. Hill*, 216 W.Va. 155, 162 n. 10, 603 S.E.2d 177, 184 n. 10 (2004).<sup>2</sup> adjudicated or waived. He has had at least three prior opportunities to attack his unlawful wounding conviction.

[Petitioner]’s claim[s] of faulty indictments and prosecutorial misconduct also fail. The case law provides that the indictment does not have to quote the statutory language exactly. [Petitioner]’s final claim that he had ineffective counsel also fails. He was deemed competent by several evaluations. He also told the court that his plea was free and voluntary.

He can also not prove that with other counsel the outcome would have been different. Even if the writ of *coram nobis* still exists in the post-conviction context, it is only of “limited scope,” not recognizing numerous errors that are not considered fundamental in nature. *State ex rel. Richey v. Hill*, 216 W.Va. 155, 162 n. 10, 603 S.E.2d 177, 184 n. 10 (2004).<sup>4</sup> On appeal, petitioner argues that the indictments against him in Nos. 75-8-3, 75-8-4, and 75-8-19 should be dismissed with prejudice.

The State argues that the circuit court did not err in denying the petition because all the issues raised in this case—petitioner’s third post-conviction proceeding—have been finally adjudicated or waived. The State notes that petitioner has had at least three prior opportunities to challenge his unlawful wounding conviction and/or any issues related to the indictments.

Petitioner does not dispute that he had habeas hearings in both 1976 and 1984, nor does he allege that those hearings were somehow procedurally deficient. With respect to the 1976 hearing, petitioner even indicates that he was represented by appointed counsel.

Thus, petitioner had an obligation to raise “all matters known or which with reasonable diligence could have been known.” *Syl. Pt. 4, Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981) (holding that a prior omnibus habeas corpus hearing allows the doctrine of *res judicata* to bar subsequent proceedings).<sup>5</sup> Therefore, after careful consideration, this Court concludes that the doctrine of *res judicata* bars the instant petition and that the circuit court did not err in denying it.<sup>6</sup>

<sup>4</sup> See also *United States v. Mayer*, 235 U.S. 55, 69 (1914) (*Coram nobis* is available only to correct errors “of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid.”).

<sup>5</sup> *Losh* allows for an exception to the principles of *res judicata* for changes in the law, favorable to the petitioner, which may be retroactively applied. Upon a review of the petition, this Court finds that petitioner cited no case law that comes within this exception. Specifically, petitioner argued

that decisions holding that an indictment must set forth the essential elements of the offense charged represent a change in the law since 1976 favorable to him.

However, this Court has held the same as far back as 1966. See Syl. Pt. 1, *State ex rel. Combs v. Boles*, 151 W.Va. 194, 151 S.E.2d 115 (1966) (“In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment.”). 6 Even if the issue were reached, this Court notes that the indictments in Nos. 75-8-3, 75-8-4, and 3 For the foregoing reasons, we find no error in the decision of the Circuit Court of McDowell County and affirm its order, entered May 11, 2012, denying the petition for a writ of habeas corpus or, in the alternative, *coram nobis*.

Affirmed. ISSUED: May 17, 2013 CONCURRED IN BY: Chief Justice Brent D. Benjamin Justice Robin Jean Davis Justice Margaret L. Workman Justice Menis E. Ketchum Justice Allen H. Loughry II 75-8-19 were not flawed. First, “[i]n this State there is no such thing as an indictment for murder in the first or second degree; the indictment is for murder, and it depends upon the proof, whether it is in the first or second degree.” Syl.

Pt. 4, *State v. Schnelle*, 24 W.Va. 767 (1884) (emphasis in original). Second, with respect to the indictment in No. 75-8-19, this Court agrees with the State that a careful reading of the indictment indicates that petitioner’s assertion that the names therein were transposed is incorrect. 4