

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Ronald W. Holcomb v. Donnie Ames, Superintendent, Mt. Olive Correctional Complex

No. 19-0172 (Mercer County 18-C-282) · No. No. 19-0172 (Mercer County 18-C-282) · Decided June 3, 2020

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the Mercer County Circuit Court's denial of Ronald W. Holcomb's second petition for a writ of habeas corpus. The court held that Holcomb had been adequately advised of the Losh checklist, that his ineffective-assistance claims did not warrant an evidentiary hearing or appointment of counsel, and that the remaining claims were barred by res judicata, prior adjudication, or waiver. The court issued the decision as a memorandum decision under Rule 21.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Per curiam; Chief Justice Tim Armstead; Justice Margaret L. Workman; Justice Elizabeth D. Walker; Justice Evan H. Jenkins; Justice John A. Hutchison
JURISDICTION	West Virginia
DECIDED	June 3, 2020
DOCKET	No. 19-0172 (Mercer County 18-C-282)
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed the Circuit Court of Mercer County's order denying his second petition for a writ of habeas corpus.
STANDARD OF REVIEW	The final order and ultimate disposition in a habeas corpus action are reviewed for abuse of discretion, underlying factual findings for clear error, and questions of law de novo.
PRECEDENTIAL VALUE	Unpublished memorandum decision; limited precedential value under West Virginia appellate practice.
PARTIES	Ronald W. Holcomb v. Donnie Ames, Superintendent, Mt. Olive Correctional Complex

TOPICS

state post-conviction relief

successive petitions

habeas corpus

ineffective assistance

appellate procedure

PRACTICE AREAS

state habeas corpus

post-conviction relief

criminal procedure

QUESTIONS PRESENTED

1. Whether Holcomb's second habeas petition was barred by res judicata, prior adjudication, or waiver under *Losh v. McKenzie*.
2. Whether Holcomb was adequately advised of his obligation to raise all applicable habeas grounds during the omnibus habeas proceeding.
3. Whether the circuit court was required to hold an evidentiary hearing and appoint counsel on Holcomb's ineffective-assistance-of-habeas-counsel claims.
4. Whether the circuit court made sufficiently specific findings of fact and conclusions of law concerning the grounds raised in the second habeas petition.
5. Whether the circuit court abused its discretion in denying the second habeas petition.

HOLDINGS

1. A prior omnibus habeas corpus hearing was res judicata as to matters raised and matters known or discoverable with reasonable diligence, subject only to recognized exceptions such as ineffective assistance at the omnibus hearing, newly discovered evidence, or a favorable retroactive change in law. Holcomb's claims did not qualify for an exception.
2. Holcomb was adequately advised of his obligation to raise all applicable habeas grounds during the omnibus proceeding.
3. The circuit court could deny Holcomb's ineffective-assistance-of-habeas-counsel claims without an evidentiary hearing or appointment of counsel because the record and documentary materials showed that he was entitled to no relief.
4. The circuit court's findings satisfied the requirement that a habeas court make specific findings of fact and conclusions of law concerning the petitioner's contentions.
5. The circuit court did not abuse its discretion in denying Holcomb's second petition for a writ of habeas corpus.

KEY QUOTATIONS

“A prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly[-]discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.” (2)

“Failure to meet the burden of proof imposed by either part of the Strickland/Miller test is fatal to a habeas petitioner's claim.” (3)

“West Virginia Code [§] 53-4A-7(c) (1994) requires a circuit court denying or granting relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner, and to state the grounds upon which the matter was determined.” (3-4)

FACTUAL BACKGROUND

Holcomb was indicted in 2007 for first-degree murder and abuse by a parent resulting in the death of a child. A jury convicted him of the lesser-included offense of second-degree murder and the child-abuse offense, and the circuit court imposed consecutive forty-year sentences. After an unsuccessful direct appeal and denial of a first habeas petition, Holcomb filed a second habeas petition raising constitutional, sentencing, and ineffective-assistance claims, including an argument that he had not been adequately advised to raise all available grounds under the Losh checklist.

PROCEDURAL HISTORY

Holcomb was convicted after a jury trial of second-degree murder and abuse by a parent resulting in the death of a child and received consecutive forty-year sentences. His direct appeal was refused in 2010. The circuit court denied his first habeas petition, and the Supreme Court of Appeals affirmed that denial in 2017. The circuit court denied his second habeas petition on February 7, 2019, concluding that his claims were barred by res judicata, previously adjudicated, or waived, and the Supreme Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Holcomb v. Ballard, No. 16-1176, 2017 WL 4772896 (W. Va. Oct. 23, 2017)
- Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981)
- Mathena v. Haines, 219 W. Va. 417, 633 S.E.2d 771 (2006)
- Anstey v. Ballard, 237 W. Va. 411, 787 S.E.2d 864 (2016)
- Baker v. Civil Service Commission, 161 W. Va. 666, 245 S.E.2d 908 (1978)
- United States v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965)
- Wanstreet v. Bordenkircher, 166 W. Va. 523, 276 S.E.2d 205 (1981)
- State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)
- Strickland v. Washington, 466 U.S. 668 (1984)
- State ex rel. Vernatter v. Warden, West Virginia Penitentiary, 207 W. Va. 11, 528 S.E.2d 207 (2000)
- State ex rel. Daniel v. Legursky, 195 W. Va. 314, 465 S.E.2d 416 (1995)
- Perdue v. Coiner, 156 W. Va. 467, 194 S.E.2d 657 (1973)
- White v. Haines, 215 W. Va. 698, 601 S.E.2d 18 (2004)

- State ex rel. Watson v. Hill, 200 W. Va. 201, 488 S.E.2d 476 (1997)

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS Ronald W. Holcomb, Petitioner Below, Petitioner FILED June 3, 2020 vs.) No. 19-0172 (Mercer County 18-C-282) EDYTHE NASH GAISER, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA Donnie Ames, Superintendent, Mt. Olive Correctional Complex, Respondent Below, Respondent MEMORANDUM DECISION Petitioner Ronald W. Holcomb, self-represented, appeals the February 7, 2019, order of the Circuit Court of Mercer County denying his second petition for a writ of habeas corpus.

Respondent Donnie Ames, Superintendent, Mt. Olive Correctional Complex, by counsel Mary Beth Niday, filed a response in support of the circuit court's order. 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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure. In June of 2007, petitioner was indicted in the Circuit Court of Mercer County on the separate offenses of first-degree murder and abuse by a parent resulting in the death of a child. Petitioner proceeded to trial, and the jury found him guilty of the lesser-included offense of second- degree murder and abuse by a parent resulting in the death of a child.

By order entered on July 31, 2009, the circuit court sentenced petitioner to a determinate term of forty years of incarceration for each offense of which he was convicted and ordered that petitioner serve the sentences consecutively. Petitioner appealed his convictions. By order entered on November 18, 2010, this Court refused petitioner's appeal.

On February 27, 2012, petitioner filed his first petition for a writ of habeas corpus in the circuit court. Petitioner was denied habeas corpus relief, and we affirmed that denial in 2017. See *Holcomb v. Ballard*, No. 16-1176, 2017 WL 4772896 (W. Va. Oct. 23, 2017) (memorandum decision).

On October 11, 2018, petitioner, pro se, filed a second petition for a writ of habeas corpus in the circuit court. Petitioner raised thirteen grounds for relief and reserved the right to raise additional grounds if later discovered. Of the thirteen grounds for relief, two asserted that West 1 Virginia

Code § 61-8D-2a(a), which sets forth the offense of abuse by a parent resulting in the death of a child, was unconstitutional for nonsensical reasons.

1 Petitioner also asserted that his sentences were unconstitutionally disproportionate, even though that principle does not apply to his case. 2 Petitioner further asserted ineffective assistance of trial counsel, habeas counsel, and/or habeas appellate counsel.

In addition, petitioner argued that he had the right to file a successive habeas petition, alleging that he was not adequately advised of his obligation under *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), to raise all applicable habeas grounds in the omnibus proceeding or have them waived. By order entered on February 7, 2019, the circuit court rejected petitioner's contention that habeas counsel failed to adequately discuss the Losh checklist with him, 3 determined that petitioner's allegations of ineffective assistance of habeas counsel could be summarily denied based on the record, and found all other grounds barred by the doctrine of *res judicata*, as previously adjudicated and/or waived in the Holcomb habeas proceeding.

Petitioner now appeals the circuit court's February 7, 2019, order. This Court reviews circuit court orders denying habeas relief under the following standard: "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review.

We 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, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

However, because we have before us the denial of petitioner's second habeas petition, we first consider the application of Syllabus Point 4 of *Losh*: 1 Petitioner first argued that the Legislature's enactment of West Virginia Code § 61-8D- 2a(a) constituted a bill of attainder but failed to explain how he was subjected to "trial by legislature." *Baker v. Civil Service Comm'n*, 161 W. Va. 666, 677, 245 S.E.2d 908, 914 (1978) (quoting *U.S. v. Brown*, 381 U.S. 437, 442, 85 S. Ct.

1707, 1712, 14 L. Ed. 2d 484, 488 (1965)). Petitioner further argued that, while first-degree murder and abuse by a parent resulting in the death of a child constitute separate offenses, the elements of the child abuse offense needed to be "harmonized" with those of first-degree murder for West Virginia Code § 61-8D-2a(a) to be constitutional. 2 "While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl.

Pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). 3 The checklist of grounds typically used in habeas corpus proceedings, usually referred to as the Losh checklist,

originates from our decision in Losh where we set forth the most common grounds for habeas relief. See 166 W. Va. at 768-70, 277 S.E.2d at 611-12. 2 A prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly[-]discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

166 W. Va. at 762-63, 277 S.E.2d at 608. Petitioner argues that the doctrine of res judicata does not apply to this case by alleging that he was not adequately advised of his obligation under Losh to raise all applicable habeas grounds in the omnibus proceeding or have them be deemed waived. Based on our review of the December 12, 2014, omnibus hearing transcript, the Losh checklist was discussed twice.

First, during habeas counsel's examination of a witness, respondent's counsel questioned if petitioner was alleging an error in the grand jury presentation. Habeas counsel responded that petitioner did not waive that ground on the Losh checklist.

Second, during petitioner's testimony, the circuit court asked petitioner if he met with habeas counsel to discuss the Losh checklist and whether petitioner checked "all the issues that [petitioner] wanted [habeas counsel] to raise in [the] habeas corpus petition." Petitioner answered affirmatively to both questions.

Therefore, we find that petitioner was adequately advised of his obligation to raise all applicable habeas grounds in the omnibus proceeding. Petitioner further argues that the circuit court should have held an evidentiary hearing and appointed counsel regarding his ineffective assistance of habeas counsel claims. 4 In Syllabus Point 3 of *Anstey*, we held: "'A court having jurisdiction over habeas corpus proceedings 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 4 In Syllabus Point 5 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), we held: 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. "Failure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner's claim." *State ex rel.*

Vernatter v. Warden, West Virginia Penitentiary, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999) (citing *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 321, 465 S.E.2d 416, 423 (1995)). 3

evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief.' Syllabus Point 1, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973)." Syl.

Pt. 2, *White v. Haines*, 215 W. Va. 698, 601 S.E.2d 18 (2004). 237 W. Va. at 412, 787 S.E.2d at 864. Here, based on our review of both the record and our decision in *Holcomb*, we find that petitioner's ineffective assistance of habeas counsel allegations were insufficient to warrant an evidentiary hearing and the appointment of counsel.

Finally, petitioner argues that the circuit court failed to make specific findings of fact and conclusions of law with regard to each ground for relief raised in his petition. In Syllabus Point 1 of *State ex rel. Watson v. Hill*, 200 W. Va. 201, 488 S.E.2d 476 (1997), we held that "West Virginia Code [§] 53-4A-7(c) (1994) requires a circuit court denying or granting relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner, and to state the grounds upon which the matter was determined." Here, we find that the circuit court's findings satisfied the requirement set forth in Syllabus Point 1 of *Watson* where it (1) rejected petitioner's contention that habeas counsel failed to adequately discuss the Losh checklist with him; (2) determined that petitioner's allegations of ineffective habeas counsel could be summarily denied based on the record; and (3) found all other grounds barred by the doctrine of *res judicata*, as previously adjudicated and/or waived in the *Holcomb* habeas proceeding.

Therefore, we conclude that the circuit court did not abuse its discretion in denying petitioner's second habeas petition. For the foregoing reasons, we affirm the circuit court's February 7, 2019, order denying petitioner's second petition for a writ of habeas corpus. Affirmed. ISSUED: June 3, 2020 CONCURRED IN BY: Chief Justice Tim Armstead Justice Margaret L. Workman Justice Elizabeth D. Walker Justice Evan H. Jenkins Justice John A. Hutchison 4