

SUPREME COURT OF APPEALS OF WEST VIRGINIA

William J. v. Ralph Terry, Acting Warden

No. 17-0230 (Preston County 17-C-05) (W. Va. May 18, 2018) · No. No. 17-0230 · Decided May 18, 2018

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the dismissal of William J.'s fifth petition for a writ of habeas corpus. The court held that his claims concerning ineffective assistance by prior habeas counsel, newly discovered evidence, and alleged unreliability of former serologist Fred Zain's testimony had been previously adjudicated, waived, or did not qualify for an exception to res judicata. The court also denied his motion for appointment of appellate counsel.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Margaret L. Workman; Justice Robin Jean Davis; Justice Menis E. Ketchum; Justice Allen H. Loughry II; Justice Elizabeth D. Walker
JURISDICTION	West Virginia
DECIDED	May 18, 2018
DOCKET	No. 17-0230
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed the dismissal of his fifth petition for a writ of habeas corpus by the Circuit Court of Preston County.
STANDARD OF REVIEW	In a habeas appeal, 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	Published memorandum decision; precedential effect is not otherwise specified in the opinion.
PARTIES	William J. v. Ralph Terry, Acting Warden, Mt. Olive Correctional Complex

TOPICS

- state post-conviction relief
- successive petitions
- habeas corpus
- ineffective assistance
- appellate procedure

PRACTICE AREAS

Post-conviction habeas corpus

Criminal procedure

Ineffective assistance of counsel

Appellate procedure

QUESTIONS PRESENTED

1. Whether the petitioner's fifth habeas petition was barred by res judicata because the asserted Zain-related claims had previously been litigated or waived.
2. Whether the petitioner could pursue a successive habeas petition based on alleged ineffective assistance by prior habeas counsel, newly discovered evidence, or a favorable change in the law.
3. Whether the circuit court abused its discretion by dismissing the petition and denying appointment of appellate counsel.

HOLDINGS

1. The claim that Zain counsel was deficient in failing to obtain appropriate testing was previously and finally adjudicated or waived and therefore did not qualify for the ineffective-assistance exception permitting a successive habeas petition.
2. The petitioner's claims concerning a 1985 internal investigation of Fred Zain and the reliability of Zain's hair-comparison testimony were not newly discovered evidence supporting a successive petition because the claims had previously been raised and the relevant information had already been addressed in prior proceedings.
3. The petitioner's reliance on *Chambers v. Ballard* did not satisfy the favorable-change-in-law exception because *Chambers* merely restated the existing rule from *Losh* and did not announce a favorable change in law applicable retroactively.
4. The circuit court did not abuse its discretion by dismissing the fifth habeas petition because the asserted grounds were Zain issues that had been fully and finally litigated or waived.

KEY QUOTATIONS

"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." (at 3)

"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." (at 3)

"a petitioner is not entitled to "attack upon attack, and habeas corpus upon habeas corpus."" (at 6)

FACTUAL BACKGROUND

In 1988, William J. and his brother abducted the brother's twelve-year-old sister-in-law and sexually assaulted her. The victim immediately reported the crimes and identified William J.; medical examination revealed bruises, lacerations, and genital and anal trauma consistent with her account. William J. was convicted of kidnapping and multiple sexual offenses, while discredited serologist Fred Zain had performed tests on some physical evidence in the case.

PROCEDURAL HISTORY

William J. was convicted of kidnapping and multiple sexual offenses and received a life sentence with the possibility of parole plus an additional sixty-one to 105 years. After this Court refused his direct criminal appeal, he filed multiple habeas petitions, including a Zain-related petition and petitions alleging ineffective assistance of habeas counsel. The circuit court dismissed his fifth petition as barred because its claims had been fully and finally litigated or waived. The Supreme Court of Appeals affirmed and denied his motion for appointment of appellate counsel.

DISPOSITION

affirmed

CASES CITED

- In re K.H., 235 W. Va. 254, 773 S.E.2d 20 (2015)
- In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993)
- State v. Edward Charles L., 183 W. Va. 641, 398 S.E.2d 123 (1990)
- In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W. Va. 321, 438 S.E.2d 501 (1993)
- State v. Atkins, 163 W. Va. 502, 261 S.E.2d 55 (1979), cert. denied, 445 U.S. 904 (1980)
- William J. v. Ballard, No. 11-0209, 2012 WL 5869967 (W. Va. Nov. 19, 2012) (memorandum decision)
- William J. v. Ballard, No. 12-1006 (W. Va. Sept. 19, 2014) (memorandum decision)
- 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)
- Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981)
- State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)
- Strickland v. Washington, 466 U.S. 668 (1984)
- State v. Hutton, 235 W. Va. 724, 776 S.E.2d 621 (2015)
- In Re: T.O., 238 W. Va. 455, 796 S.E.2d 564 (2017)
- State v. McKinley, 234 W. Va. 143, 764 S.E.2d 303 (2014)
- Chambers v. Ballard, No. 14-0020, 2014 WL 1686823 (W. Va. Apr. 28, 2014) (memorandum decision)
- Call v. McKenzie, 159 W. Va. 191, 220 S.E.2d 665 (1975)
- White v. Haines, 215 W. Va. 698, 601 S.E.2d 18 (2004)
- In re: T.O., 238 W. Va. 455, 796 S.E.2d 564 (2017)

