

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Clarence S. v. David Ballard, Warden

Clarence S. · No. No. 14-0356 · Decided November 21, 2014

OPINION

Clarence S. v. David Ballard, Warden

PER CURIAM.

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

Clarence S., Petitioner Below, Petitioner FILED November 21, 2014

RORY L. PERRY II, CLERK

vs) No. 14-0356 (Fayette County 13-C-311) SUPREME COURT OF APPEALS

OF WEST VIRGINIA

David Ballard, Warden, Mt. Olive Correctional Complex, Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Clarence S.,¹ appearing pro se, appeals the order of the Circuit Court of Fayette County, entered March 4, 2014, that summarily denied his petition for writ of habeas corpus. Respondent warden, by counsel Laura Young, filed a response, and 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. On May 8, 2007, petitioner was indicted on five counts of sexual assault in the second degree in violation of West Virginia Code § 61-8B-4, and five counts of sexual abuse by a parent, guardian, or custodian in violation of West Virginia Code § 61-8D-5. The charges concerned K.W., the twelve-year-old daughter of petitioner's girlfriend. At a November 2, 2007, plea hearing, petitioner admitted that he was K.W.'s custodian at the time of his offenses. Petitioner entered a guilty plea to three counts of sexual abuse by a parent, guardian, or custodian. In exchange, the State dismissed the remaining counts of the indictment. In offering his plea to the circuit court, petitioner admitted that he had engaged in sexual relations with K.W. by (1) performing oral sex on K.W.; (2) having K.W. perform oral sex on him; and (3) engaging in vaginal intercourse with K.W. Petitioner testified that, although he understood that K.W. was not old enough to consent to the acts, he did not forcibly compel her to participate in them. Petitioner also indicated that he was satisfied with the performance of his trial counsel. Petitioner did not object when counsel informed the circuit court that counsel had received the State's discovery and

had discussed it with petitioner. 1 Consistent with our practice in cases involving sensitive facts, we use only petitioner's first name and last initial, and identify the minor victim only by her initials. See *State ex rel. W.Va. Dept. of Human Services v. Cheryl M.*, 177 W.Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987). 1 On December 19, 2007, the circuit court sentenced petitioner to three consecutive terms of ten to twenty years in prison. The circuit court noted that, while petitioner expressed remorse at his plea hearing and his intake interview with his probation officer, he stated to the evaluator at his psychological evaluation that the charges against him were false and that K.W.'s mother had made up the story. Also, the evaluator felt that petitioner deliberately attempted to deceive the evaluator by withholding or distorting information. (Petitioner failed to disclose that he was living with a brother, who was a registered sex offender.) The circuit court noted that the final recommendation of the evaluation was that petitioner's behavior led to a very poor prognosis for change or for treatment to be effective in any meaningful way. Accordingly, the circuit court denied petitioner's motion to be placed on probation in lieu of his prison sentences, finding that it was not a viable option under the circumstances. In his direct appeal of his conviction to this Court, petitioner argued that his three consecutive prison terms were unconstitutionally disproportionate to the severity of his offenses. On June 22, 2010, this Court refused petitioner's appeal. On December 2, 2013, petitioner filed a petition for writ of habeas corpus raising the following issues: (1) counsel provided ineffective assistance because counsel (a) failed to adequately investigate petitioner's case, and (b) gave erroneous advice as to whether petitioner should accept a plea agreement; (2) medical records that were part of the State's discovery constituted "newly discovered evidence" because, contrary to what was stated at the plea hearing, counsel did not discuss these records with petitioner;² (3) K.W. was improperly coached by her mother; (4) the circuit court erred in giving petitioner a harsher sentence merely because his brother was a registered sex offender; and (5) the indictment contained illegal counts because petitioner was not K.W.'s custodian at the time of the offenses. On March 4, 2014, the circuit court summarily denied habeas relief in a comprehensive forty-four page order that refuted every issue petitioner raised in the petition. In denying relief, the circuit court specifically found that the petition, as filed, "and the record in this matter, are sufficient for the Court to conduct a fair and thorough adjudication of the matters raised without an evidentiary hearing and without the appointment of counsel[.]" Petitioner now appeals the circuit court's March 4, 2014, order that summarily denied his habeas petition. We review such an order petition 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 2 Petitioner claimed that two answers K.W. gave on the sexual assault investigation form, combined with the statement K.W. provided law enforcement, demonstrated that petitioner did not engage her to perform oral sex despite the fact that, at the November 2, 2007, plea hearing, petitioner had admitted that K.W. performed oral sex

on him and that he performed oral sex on her. 2 law are subject to a de novo review. Syl. Pt. 1, Mathena v. Haines, 219 W.Va. 417, 633 S.E.2d 771 (2006). On appeal, petitioner asserts that, without an evidentiary hearing and appointment of counsel, the circuit court was not capable of adequately adjudicating his petition because he raised the following issues: (1) ineffective assistance of counsel; (2) “newly discovered evidence” in the form of medical records that, according to petitioner, he did not learn about until after his guilty pleas; (3) the coaching of K.W. by her mother; (4) the impermissible factor that, according to petitioner, the circuit court utilized during petitioner’s sentencing;³ and (5) the illegality of the indictment counts because petitioner was not K.W.’s custodian at the time of the offenses. Respondent warden counters that, pursuant to Syllabus Point 1 of *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973), “[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 evidence filed therewith show to such court’s satisfaction that the petitioner is entitled to no relief.” We agree and conclude that the circuit court did not abuse its discretion in summarily denying the petition. Having reviewed the circuit court’s “Order Summarily Denying and Dismissing Petition,” entered March 4, 2014, we hereby adopt and incorporate the circuit court’s well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court’s order to this memorandum decision.⁴ For the foregoing reasons, we affirm. Affirmed. 3 Petitioner refers to the fact that his brother was a registered sex offender. Given that petitioner was living with this brother, respondent warden does not concede that this would have been an impermissible factor for the circuit court to have considered during sentencing. In any case, what disturbed the circuit court was not the fact that petitioner’s brother was a sex offender, but that petitioner failed to disclose that he was living with his brother during his psychological evaluation. In his reply, petitioner, for the first time, asserts that it is factually inaccurate that he was living with this brother. Rather, petitioner now states that he was living with a different brother, who was not a registered sex offender, and that counsel should have moved the circuit court to correct the presentence report as to this issue. We decline to consider this argument because the record does not support petitioner’s assertion that he was living with a different brother. See Rule 10(c)(7), W.V.R.A.P. (“The Court may disregard errors that are not adequately supported by specific references to the record on appeal.”). 4 Certain names have been redacted. See fn. 1. 3 ISSUED: November 21, 2014 CONCURRED IN BY: Chief Justice Robin Jean Davis Justice Brent D. Benjamin Justice Margaret L. Workman Justice Menis E. Ketchum Justice Allen H. Loughry II 4