

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nicole L. Kees v. J.D. Sallaz, Superintendent

Nicole L. Kees v. J.D. Sallaz, Superintendent · No. No. 17-1111 · Decided November 21, 2018

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the denial of Nicole L. Kees's amended second petition for a writ of habeas corpus. The court held that West Virginia Code § 60A-4-416(a), enacted after Kees's conviction, did not apply retroactively and that her ineffective-assistance-of-habeas-counsel claims failed under the Miller/Strickland standard.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Margaret L. Workman; Justice Elizabeth D. Walker; Justice Tim Armstead; Justice Evan H. Jenkins; Justice Paul T. Farrell sitting by temporary assignment
JURISDICTION	West Virginia
DECIDED	November 21, 2018
DOCKET	No. 17-1111
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed the Berkeley County Circuit Court's denial of her amended 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	Published memorandum decision; the opinion states that it is issued under Rule 21 and finds no substantial question of law.
PARTIES	Nicole L. Kees v. J.D. Sallaz, Superintendent, Lakin Correctional Center

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QUESTIONS PRESENTED

1. Whether West Virginia Code § 60A-4-416(a), enacted after Kees's conviction, applied retroactively so that she could be resentenced under its determinate sentencing range.
2. Whether habeas counsel was constitutionally ineffective for failing to review the Losh list, inadequately arguing the applicability of felony murder, and failing to challenge the proof of the decedent's cause of death.

HOLDINGS

1. West Virginia Code § 60A-4-416(a) does not apply retroactively because it contains neither clear language nor a necessary implication that the Legislature intended retroactive application.
2. Kees failed to establish ineffective assistance of habeas counsel because she did not show deficient performance and resulting prejudice under the Miller/Strickland test.

KEY QUOTATIONS

“The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.” (at 2)

“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: (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.” (at 3)

“Counsel cannot be ineffective for failing to raise a meritless argument.” (at 4)

FACTUAL BACKGROUND

In January 2004, Nicole Kees and Jashua Frocke forged and uttered checks, and Kees obtained heroin with the proceeds. Kees later gave Frocke some of the heroin, and he fatally overdosed. Kees was convicted of felony murder and sentenced to life imprisonment with mercy.

PROCEDURAL HISTORY

Kees was convicted by a jury of felony murder and sentenced to life imprisonment with mercy. This Court refused her direct appeal in 2008, and affirmed the denial of her first habeas petition in 2013. After filing a second habeas petition based on an asserted favorable change in the law and ineffective assistance of habeas counsel, the circuit court denied the amended petition, and Kees appealed.

DISPOSITION

affirmed

CASES CITED

- Kees v. Nohe, No. 11-1465, 2013 WL 149614 (W.Va. Jan. 14, 2013) (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)
- Teague v. Lane, 489 U.S. 288 (1989)
- Penry v. Lynaugh, 492 U.S. 302 (1989)
- Welch v. U.S., -- U.S. --, 136 S.Ct. 1257 (2016)
- Martinez v. Asplundh Tree Expert Co., 239 W.Va. 612, 803 S.E.2d 582 (2017)
- State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995)
- Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)
- State ex rel. Daniel v. Legursky, 195 W.Va. 314, 465 S.E.2d 416 (1995)
- Harold M. v. Ballard, No. 15-0813, 2016 WL 2970849 (W.Va. May 20, 2016) (memorandum decision)

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