

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Wendell K. Ash v. David Ballard, Warden

Ash v. Ballard · No. No. 12-0470 · Decided April 5, 2013

SUMMARY

The West Virginia Supreme Court of Appeals affirmed the denial of Wendell K. Ash’s petition for a writ of habeas corpus challenging his conviction and sentence for second-degree sexual assault. The court held that the circuit court did not abuse its discretion, adopted the circuit court’s findings and conclusions, and declined to consider an issue not raised below.

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	April 5, 2013
DOCKET	No. 12-0470
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed the Circuit Court of Fayette County's denial of his petition for a writ of habeas corpus challenging his conviction and sentence for second degree sexual assault entered pursuant to a guilty plea.
STANDARD OF REVIEW	The denial of a habeas corpus petition is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published memorandum decision; the opinion states that it is issued under Rule 21 as a memorandum decision and finds no substantial question of law or prejudicial error.
PARTIES	Wendell K. Ash v. David Ballard, Warden

TOPICS

- state post-conviction relief
- habeas corpus
- appellate procedure
- right to counsel
- preservation of error

PRACTICE AREAS

state post-conviction relief

criminal procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether the circuit court abused its discretion in denying Ash's habeas corpus petition.
2. Whether the circuit court erred by denying the petition without appointing habeas counsel.
3. Whether Ash could raise on appeal a claim that trial counsel failed to inform him of the details of the victim's written statement when that claim was not presented to the circuit court.

HOLDINGS

1. The circuit court did not abuse its discretion in denying Ash's petition for a writ of habeas corpus.
2. A court with jurisdiction over habeas corpus proceedings may deny a petition without a hearing and without appointing counsel when the petition and supporting materials demonstrate that the petitioner is entitled to no relief.
3. The Court would not consider a claim that was not raised before the circuit court.

KEY QUOTATIONS

“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.” (-1)

FACTUAL BACKGROUND

Ash was already incarcerated at Mt. Olive Correctional Complex when he was charged with four offenses arising from the sexual assault of a female prison employee in June 1995. He pleaded guilty to second degree sexual assault, and the other three counts were dismissed as part of the plea agreement. The circuit court imposed a ten-to-twenty-five-year sentence consecutive to the life-without-parole sentence Ash was already serving for first degree murder.

PROCEDURAL HISTORY

Ash pleaded guilty to second degree sexual assault in 1996, and the remaining three indictment counts were dismissed under the plea agreement. The circuit court sentenced him to ten to twenty-five years to run after his existing Wood County life-without-parole sentence. In 2011, Ash filed a habeas petition, which the circuit court denied after making findings of fact and conclusions of law. The Supreme Court of Appeals of West Virginia affirmed.

DISPOSITION

affirmed

CASES CITED

- Perdue v. Coiner, 156 W. Va. 467, 194 S.E.2d 657 (1973)
- Mathena v. Haines, 219 W. Va. 417, 633 S.E.2d 771 (2006)
- Sands v. Security Trust Co., 143 W. Va. 522, 102 S.E.2d 733 (1958)

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

Wendell K. Ash, FILED

April 5, 2013

Petitioner Below, Petitioner RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

vs.) No. 12-0470 (Kanawha County 11-C-136)

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

MEMORANDUM DECISION

Petitioner Wendell K. Ash, pro se, appeals the order of the Circuit Court of Fayette County, entered November 23, 2011, denying his petition for a writ of habeas corpus. The respondent warden by Laura Young, his attorney, filed a summary response.

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,¹ 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.

On June 3, 2011, petitioner filed a petition for a writ of habeas corpus seeking review of his conviction and sentence for second degree sexual assault pursuant to his guilty plea in Felony No. 95-F-73. At the time of the incident, June 1995, petitioner was already an inmate at Mt. Olive Correctional Complex. The indictment charged him with four separate offenses relating to the sexual assault of a female prison employee. As part of the plea agreement, the three other counts were dismissed.

At an October 16, 1996 sentencing hearing, the parties presented arguments as to whether petitioner's sentence in the case at bar should be concurrent with or consecutive to the sentence he already was serving.² After hearing arguments of counsel, the circuit court sentenced petitioner to

1

Certain documents were attached to petitioner's brief. Also, on May 14, 2012, the respondent warden filed a motion to dismiss the appeal, or in the alternative, to supplement the record. By an order entered June 6, 2012, this Court refused the motion to dismiss but granted the motion to supplement.

2

Petitioner had been convicted of first degree murder in Wood County. He was sentenced to life in prison without parole.

-1

ten to twenty-five years in prison "to run after you have served your sentence out of Wood County."

On November 23, 2011, in an order containing numerous findings of fact and conclusions of law, the circuit court addressed various grounds of relief and denied the petition. On appeal, petitioner makes numerous assignments of error including that the circuit court should have appointed him habeas counsel. But see Syl. Pt. 1, *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."). The respondent warden argues that the circuit court did not err in denying the petition.

We review the circuit court's denial of a habeas petition under an abuse of discretion standard. See Syl. Pt. 1, in part, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). After careful consideration of the parties' arguments, this Court concludes that the circuit court did not abuse its discretion in denying the petition. We hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal.³ The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we find no error in the decision of the Circuit Court of Fayette County and affirm its November 7, 2011 order denying petitioner's petition for a writ of habeas corpus.

Affirmed.

ISSUED: April 5, 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

3

As his final assignment of error, petitioner alleges that his conviction should be set aside because counsel failed to inform him of the details of the victim's written statement. The circuit court did not address this issue because petitioner did not raise it below. This Court will not pass on the issue

in the first instance. See Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).

-2