

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.

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

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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.

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

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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

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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).

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