

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State ex rel. Joey K. Jeffery v. Ralph Terry, Superintendent

No. 17-0216 · No. No. 17-0216 · Decided October 15, 2018

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the denial of Joey K. Jeffery’s amended petition for a writ of habeas corpus. The court rejected claims involving ineffective assistance of counsel, juror communications, the petitioner’s absence from proceedings, the failure to initially swear a witness, evidentiary rulings, and cumulative error. The court held that the plain error doctrine was not triggered and adopted the circuit court’s findings and conclusions.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Margaret L. Workman; Justice Elizabeth D. Walker; Justice Paul T. Farrell sitting by temporary assignment; Justice Tim Armstead; Justice Evan H. Jenkins
JURISDICTION	West Virginia
DECIDED	October 15, 2018
DOCKET	No. 17-0216
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed the Circuit Court of Kanawha County's denial of his amended petition for a writ of habeas corpus challenging his criminal conviction and sentence.
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PRECEDENTIAL VALUE	Nonprecedential memorandum decision
PARTIES	Joey K. Jeffery v. Ralph Terry, Superintendent, Mt. Olive Correctional Complex

TOPICS

- state post-conviction relief
- habeas corpus
- ineffective assistance
- appellate procedure
- criminal procedure

PRACTICE AREAS

post-conviction relief

criminal procedure

appellate procedure

ineffective assistance

evidence

QUESTIONS PRESENTED

1. Whether Jeffery received ineffective assistance of trial counsel.
2. Whether unobjected-to communications between the trial court and jurors deprived Jeffery of a fair trial.
3. Whether Jeffery was absent during critical stages of the proceedings in violation of due process.
4. Whether the trial court committed plain error by allowing a witness to testify before being sworn.
5. Whether the trial court improperly admitted certain evidence.
6. Whether cumulative error required habeas relief.
7. Whether the alleged unpreserved errors satisfied the plain-error doctrine.

HOLDINGS

1. The plain-error doctrine was not triggered because the alleged errors did not affect the fairness, integrity, or public reputation of the judicial proceedings and did not result in a miscarriage of justice.
2. The circuit court did not clearly err or abuse its discretion in denying Jeffery's amended habeas petition, and its findings and conclusions were adopted and incorporated.
3. In a habeas corpus action, the final order and ultimate disposition are reviewed for abuse of discretion, underlying factual findings for clear error, and legal questions de novo.

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.” (at 3)

“To trigger the application of the plain error doctrine, there must be “(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.”” (at 3)

“Because we find no clear error or abuse of discretion in the circuit court’s order or record before us, we hereby adopt and incorporate the circuit court’s findings and conclusions as they relate to petitioner’s assignments of error raised on appeal” (at 4)

FACTUAL BACKGROUND

Jeffery was convicted of kidnapping, second-degree robbery, malicious wounding, and assault arising from the abduction and beating of Leanne Quinn. At trial, the court excused one juror after an inquiry concerning familiarity with a witness and addressed another juror's disclosed familiarity with the victim; the defense did not object. A prosecution witness also testified before being sworn, but was immediately sworn and confirmed that her prior testimony was truthful. Jeffery later alleged ineffective assistance, due process violations, evidentiary errors, and cumulative error in his habeas petition.

PROCEDURAL HISTORY

Jeffery was convicted in February 2014 and sentenced on April 9, 2014, to four consecutive terms of imprisonment. This Court affirmed his convictions on direct appeal in *State v. Jeffery*, No. 14-0888, 2015 WL 1740281. Jeffery then filed an initial habeas petition, later amended it, and received an omnibus hearing. The circuit court denied habeas relief, and the Supreme Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- *State v. Jeffery*, No. 14-0888, 2015 WL 1740281 (W. Va. Apr. 13, 2015)
- *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)
- *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006)
- *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2010)
- *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046 (1985)

OPINION

SER Joey K. Jeffery v. Ralph Terry, Superintendent

PER CURIAM.

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

State of West Virginia ex rel. Joey K. Jeffery, Petitioner Below, Petitioner FILED October 15, 2018 vs) No. 17-0216 (Kanawha County 15-P-338) EDYTHE NASH GAISER, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Ralph Terry, Superintendent, Mt. Olive Correctional Complex, Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Joey K. Jeffery, by counsel Matthew A. Victor, appeals the February 13, 2017, order of the Circuit Court of Kanawha County denying his petition for writ of habeas corpus. Respondent Ralph Terry, Superintendent, Mt. Olive Correctional Complex, by counsel Benjamin F. Yancey, III, filed a response in support of the circuit court's order.¹ This 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 order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure. In February of 2014, petitioner was convicted of the kidnapping, second-degree robbery, malicious wounding, and assault of Leanne Quinn. In the early morning hours of December 8, 2012, petitioner and his

girlfriend, Cindy Creathers, saw Ms. Quinn in a passing vehicle and reportedly observed a number of petitioner's personal items in Ms. Quinn's possession. Later that morning, petitioner confronted Ms. Quinn regarding the items and struck her in the face and stomach. Petitioner then forced Ms. Quinn into a vehicle and drove her to his home, where she was beaten with a bat and otherwise assaulted by petitioner and Ms. Creathers. Ultimately, petitioner drove Ms. Quinn to an isolated area where she was kicked, punched, forced to her knees, and a handgun was discharged near her head. Petitioner took Ms. Quinn's shoes and coat, 1 Effective July 1, 2018, the positions formerly designated as "wardens" are now "superintendents." See W.Va. Code § 15A-5-3. At the time of the filing of this appeal, David Ballard was then warden at Mt. Olive Correctional Complex and, as such, was originally listed as the respondent below. However, the acting warden, now superintendent, is Ralph Terry. Accordingly, the Court has made the necessary substitution of parties pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure. 1 and threatened to kill her children if she reported the incident and did not return his personal items Upon her release from captivity, Ms. Quinn reported her kidnapping and assault to law enforcement. On March 28, 2013, a Kanawha County Grand Jury returned a multi-count indictment against petitioner and Ms. Creathers, for the felony offenses of kidnapping, malicious wounding, first-degree robbery, and assault during the commission of a felony. Before trial, pursuant to a plea agreement, Ms. Creathers pled guilty to conspiracy to commit robbery in the first-degree and agreed to testify against petitioner at trial. Prior to trial, petitioner's trial counsel moved the court to have petitioner evaluated for competency. A subsequent competency evaluation was completed and petitioner was determined to be competent to stand trial. Petitioner's trial began on February 10, 2014, and continued for three days. On the first day of trial, the victim testified. Through her testimony, Ms. Quinn related the story of her kidnapping and assault at the hands of petitioner and Ms. Creathers. Following the direct testimony of Ms. Quinn, a juror approached the bench and had a short off-the-record discussion with the court, out of the hearing of the jury and without counsel or petitioner present, wherein a juror inquired as to the maiden surname of Ms. Creathers. The juror returned to his seat and the court called counsel to the bench, advised what inquiry had been made by the juror, and advised petitioner's counsel that he could "fully voir dire" the juror at a later point. After this conference, Ms. Quinn was cross-examined. Following the cross-examination, the jury was excused with the exception of the juror at issue. With the rest of the jury excused, petitioner's counsel, with petitioner present, questioned the juror who advised that he "did not have an extensive acquaintance with [Ms.] Creathers and that he would judge Ms. Creathers' credibility as with any other witness." Counsel and the court conferred following the voir dire and the juror was excused from further service. An alternate juror who had been previously impaneled continued to hear the case in the stead of the excused juror. No objections were made by either counsel. On the second day of trial, the State continued the presentation of its case, which included the testimony of law enforcement representatives. As its final witness, the State called Ms. Creathers who testified regarding the occurrence of the underlying criminal

incident. At some point in her testimony, it was brought to the trial court's attention that Ms. Creathers had not been sworn prior to testifying. Thereafter, Ms. Creathers was immediately sworn and was directly asked by the court if the testimony she had provided prior to being sworn was honest and truthful, to which she replied, yes. Ms. Creathers was given the opportunity by the court to change any of her testimony given prior to being sworn, but she noted there was no testimony she would change. No objection was made by either counsel. Under cross-examination, Ms. Creathers advised that she struck Ms. Quinn once with a bat and threatened her with a knife. Ms. Creathers corroborated Ms. Quinn's testimony and, when asked about her motive for testifying against petitioner, Ms. Creathers stated she was testifying because it was the right thing to do. At the beginning of the third and final day of trial, the court had an off-the-record discussion, outside of the presence of the jury and counsel, with Juror Hogan. Juror Hogan 2 advised the court that she had discovered a "confusing, distant familiarity with Ms. Quinn." Thereafter, without petitioner being present, a bench conference between the parties' counsel, the court, and Juror Hogan was held. During this conference, petitioner's counsel asked the juror if there was anything "that would cause you to not be able to fairly consider the evidence that's in front of you?" to which the juror replied, "No, there is not." Juror Hogan advised that she had not made any statements to her fellow jurors regarding her concerns. No objection was made by counsel. The trial commenced and the defense called Tracy Campbell to testify. Mr. Campbell described a conversation that he had with Ms. Quinn wherein Ms. Quinn advised that she had thrown her shoes and coat at petitioner on the evening in question and cursed at him. Further, Mr. Campbell testified that Ms. Quinn never told him that petitioner struck or beat her on the evening in question. Thereafter the defense re-called Ms. Quinn to testify in an attempt to discredit her testimony, at the conclusion of which the defense rested. During closing arguments, petitioner's counsel highlighted the inconsistencies between the testimony of Ms. Quinn and Ms. Creathers. After deliberations, the jury returned a verdict of guilty on all charges, with a recommendation of mercy as to the kidnapping charge. On April 9, 2014, petitioner was sentenced to four consecutive sentences of imprisonment. Petitioner filed a direct appeal of his conviction, which was affirmed by this Court in *State v. Jeffery*, No. 14- 0888, 2015 WL 1740281, (W.Va. Apr. 13, 2015) (memorandum decision). On April 13, 2015, petitioner filed his initial petition for writ of habeas corpus. An amended petition was filed on petitioner's behalf on April 29, 2016. An omnibus hearing on petitioner's amended petition for writ of habeas corpus began on November 7, 2016, and continued on December 6, 2017. During this hearing, petitioner asserted that his attorney had not communicated with him and had failed to review discovery or trial strategy with him. Petitioner advised that he had given the names of specific witnesses who would aid in his defense, but those witnesses were not called to testify at trial. By order dated February 13, 2017, the circuit court denied petitioner's amended petition for a writ of habeas corpus. The court found that petitioner failed to explain how his counsel's alleged deficiencies affected the result of trial and, accordingly, did not violate the provisions of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

The court noted that petitioner's trial counsel and his retained investigator met with petitioner on numerous occasions, discussed, and "investigated" the possibility of testimony from each of the witnesses suggested by petitioner, who petitioner's trial counsel alleged would have provided unfavorable or uncorroborated testimony or the individuals simply could not be located by counsel or his investigator. The court found that none of the evidence cited by petitioner was erroneously admitted and found no basis for petitioner's petition for a writ of habeas corpus. It is from the circuit court's February 13, 2017, order that petitioner now appeals. "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 3 standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). Syl. Pt. 1, *State ex. rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2009). On appeal, petitioner asserts seven assignments of error. First, petitioner argues that he received ineffective assistance of counsel. In his second and third assignments of error, petitioner contends that under a plain error analysis he was deprived of his due process right to a fair trial when the court engaged in communications with a juror; when he was absent for critical stages of the proceedings; and when the court failed to swear in a witness prior to her testimony. In his fourth, fifth, and sixth assignments of error, petitioner argues that under a plain error analysis the trial court's rulings regarding the admission of certain evidence at trial was improper. In his final assignment of error, petitioner argues cumulative error. Our review of the record supports the circuit court's decision to deny petitioner's petition for writ of habeas corpus as to each of petitioner's assignments of error. Petitioner's arguments presented herein, with the exception of the application of the plain error doctrine, were thoroughly addressed by the circuit court in its order denying petitioner habeas relief. As to plain error, this Court has long held that the "'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. To trigger the application of the plain error doctrine, there must be "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.* at syl. pt. 7, in part. We have further noted that the plain error rule should only be exercised to avoid a miscarriage of justice and reserved for correction of those few errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046 (1985). Here, after review, we find that under the limited facts and circumstances of this case the application of the plain error doctrine is not triggered. None of the alleged errors argued by petitioner affected the fairness, integrity, or public reputation of the judicial proceedings and did not result in a miscarriage of justice. Petitioner presented substantial evidence on his behalf at trial and competently cross-examined witnesses offered by the State. Further, the record reflects that petitioner was provided multiple opportunities to conduct voir dire of jurors and was personally involved in the critical stages of the

proceedings. Accordingly, as there was no trigger of the plain error doctrine, the circuit court did not err. The circuit court's order includes well-reasoned findings and conclusions as to the assignments of error now raised on appeal. Because we find no clear error or abuse of discretion in the circuit court's order or record before us, we hereby adopt and incorporate the circuit court's findings and conclusions as they relate to petitioner's assignments of error raised on appeal and direct the Clerk to attach a copy of the circuit court's February 13, 2017, "Final Order Denying Petition for Writ of Habeas Corpus" to this memorandum decision. For the foregoing reasons, we affirm the circuit court's denial of petitioner's amended petition for habeas corpus. 4 Affirmed. ISSUED: October 15, 2018 CONCURRED IN BY: Chief Justice Margaret L. Workman Justice Elizabeth D. Walker Justice Paul T. Farrell sitting by temporary assignment Justice Tim Armstead Justice Evan H. Jenkins Justice Allen H. Loughry II suspended and therefore not participating 5