

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia v. Michelle Elaine Butler, aka Michelle Rehm

No. 13-0271 (W. Va. Mar. 31, 2014) · No. No. 13-0271 · Decided March 31, 2014

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed Michelle Elaine Butler's conviction and suspended sentence for financial exploitation of an incapacitated adult. The court declined to address her ineffective-assistance-of-counsel claim on direct appeal because the record was insufficient, but held that the plea-hearing transcript supported the conclusion that her guilty plea was knowing, intelligent, and voluntary.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Per curiam; Chief Justice Robin Jean Davis; Justice Brent D. Benjamin; Justice Margaret L. Workman; Justice Menis E. Ketchum; Justice Allen H. Loughry II
JURISDICTION	West Virginia
DECIDED	March 31, 2014
DOCKET	No. 13-0271
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from an order of the Circuit Court of Marion County sentencing petitioner to one to ten years of incarceration, suspending the sentence, and placing her on probation following her guilty plea to financial exploitation of an incapacitated adult.
STANDARD OF REVIEW	The court reviews the final order and ultimate disposition for abuse of discretion, underlying factual findings for clear error, and questions of law de novo.
PRECEDENTIAL VALUE	Unpublished memorandum decision; no substantial question of law and no prejudicial error under Rule 21.
PARTIES	Michelle Elaine Butler, aka Michelle Rehm v. State of West Virginia

TOPICS

ineffective assistance

habeas corpus

plea bargaining

criminal procedure

appellate procedure

PRACTICE AREAS

criminal procedure

post-conviction relief

appellate procedure

ineffective assistance of counsel

plea validity

QUESTIONS PRESENTED

1. Whether the court should consider petitioner's ineffective-assistance-of-counsel claim on direct appeal despite an insufficient trial record.
2. Whether the record demonstrated that petitioner's guilty plea was involuntary.

HOLDINGS

1. The court declined to address the ineffective-assistance claim on direct appeal because the record was insufficient to evaluate counsel's motivations and trial strategy; the claim was more appropriately raised in a petition for habeas corpus.
2. The record did not support a finding that petitioner's guilty plea was involuntary; the circuit court conducted an adequate plea colloquy and determined that petitioner knowingly, intelligently, and voluntarily waived her rights.

KEY QUOTATIONS

“We decline to address this issue on direct appeal because the record is insufficient. The claim of ineffective assistance of counsel would more appropriately be raised in a petition for writ of habeas corpus.” (at 2)

“Furthermore, our review of the record, and in particular, the plea hearing transcript, does not support finding that petitioner’s plea was involuntary.” (at 2)

FACTUAL BACKGROUND

Petitioner was arrested for transferring \$24,728.32 from the account of an incapacitated adult for whom she served as caregiver into a joint account and using the funds for her own purposes. She initially complained that appointed counsel was ineffective, and the circuit court replaced that counsel. After indictment, petitioner entered a guilty plea and later received a sentence of one to ten years, suspended in favor of probation. On appeal, she alleged that counsel's inadequate representation rendered the plea involuntary.

PROCEDURAL HISTORY

Petitioner was arrested and indicted for transferring and using money belonging to an incapacitated adult. After substitute counsel was appointed, petitioner entered a guilty plea on December 7, 2012. The circuit court sentenced her on February 1, 2013, suspended the sentence, and placed her on probation. She appealed, asserting ineffective assistance of counsel and that her plea was involuntary.

DISPOSITION

affirmed

CASES CITED

- Walker v. West Virginia Ethics Comm’n, 201 W. Va. 108, 492 S.E.2d 167 (1997)
- In re Dandy, 224 W. Va. 105, 680 S.E.2d 120 (2009) (per curiam)
- State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)
- U.S. v. South, 28 F.3d 619, 629 (7th Cir. 1994)
- State ex rel. Daniel v. Legursky, 195 W. Va. 314, 317 n.1, 465 S.E.2d 416, 419 n.1 (1995)

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS State of West Virginia, Plaintiff
FILED Below, Respondent March 31, 2014 RORY L. PERRY II, CLERK SUPREME COURT OF
APPEALS vs) No. 13-0271 (Marion County 12-F-198) OF WEST VIRGINIA Michelle Elaine
Butler aka Michelle Rehm, Defendant Below, Petitioner MEMORANDUM DECISION Petitioner
Michelle Elaine Butler’s appeal, by counsel Holly Turkett, arises from the Circuit Court of Marion
County’s February 1, 2013, order sentencing her to one to ten years of incarceration, but
suspending the sentence and placing her on probation, following her conviction for financial
exploitation of an incapacitated person.

The State, by counsel Robert D. Goldberg, filed a response in support of the circuit court’s order.
On appeal, petitioner alleges ineffective assistance of counsel leading to an involuntary plea. 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 circuit court’s order is appropriate under
Rule 21 of the Rules of Appellate Procedure. In August of 2012, petitioner was arrested for
mishandling money belonging to an adult for whom petitioner was caregiver.

The person was incapacitated due to legal blindness and petitioner was charged with transferring
\$24,728.32 from his account to a joint account and then using the funds for her own use, including
transferring some funds to her personal account. Bond was set at \$10,000 and petitioner was
remanded to the North Central Regional Jail and appointed counsel.

On September 7, 2012, petitioner’s counsel filed a motion for a bond reduction and the circuit
court scheduled a hearing on the matter for September 24, 2012. In the intervening time, petitioner
wrote a handwritten letter to the circuit court alleging that her counsel was not affording her
constitutionally effective assistance. Petitioner emphasized her need for a bond reduction in order

to tend to her disabled and unemployed husband, claiming that she had contacted every bondsman in Marion County but all had refused to post her bail.

At the hearing on September 24, 2013, the circuit court stayed petitioner's bond modification, but excused her first counsel from representing petitioner. The circuit court subsequently appointed new counsel. On October 10, 2012, a grand jury indicted petitioner on one count of financial exploitation of an incapacitated adult.

In November of 2012, the circuit court again denied petitioner's request for a reduced bond. 1 - Later that month, petitioner and counsel failed to appear at her plea hearing, so it was rescheduled for December 7, 2012, at which time petitioner accepted her plea. Petitioner was read and provided a copy of her post-conviction rights at that hearing. By order entered February 1, 2013, the circuit court sentenced petitioner and released her on probation.

It is from this order that petitioner appeals. This Court has stated as follows: "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

Questions of law are subject to a de novo review." Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997). Syl., *In re Dandy*, 224 W.Va. 105, 680 S.E.2d 120 (2009) (per curiam). On appeal, petitioner alleges multiple errors in her representation below, including that her counsel had little contact with her, did not appear at the first plea hearing, and failed to follow through with investigating her defense.

The petitioner raises a claim of ineffective assistance of counsel in this direct criminal appeal. Traditionally, an ineffective assistance of counsel claim is not cognizable on direct appeal because of the insufficiency of the record from the criminal trial.

We have urged counsel repeatedly to think of the consequences of raising this issue on direct appeal. Claims that an attorney was ineffective involve inquiries into motivation behind an attorney's trial strategies. See *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Without such facts trial counsel's alleged lapses or errors will be presumed tactical moves, flawed only in hindsight.

What is more, in the event a defendant pursues his claim on direct appeal and it is rejected, our decision will be binding on the circuit court through the law of the case doctrine, 'leaving [defendant] with the unenviable task of convincing the [circuit court] judge that he should disregard our previous ruling.' *U.S. v. South*, 28 F.3d 619, 629 (7th Cir.1994).

That is why in *Miller* we suggested that a defendant who presents an ineffective assistance claim on direct appeal has little to gain and everything to lose. *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 317 n.1, 465 S.E.2d 416, 419 n.1 (1995).

We decline to address this issue on direct appeal because the record is insufficient. The claim of ineffective assistance of counsel would more appropriately be raised in a petition for writ of habeas corpus. Furthermore, our review of the record, and in particular, the plea hearing transcript, does not support finding that petitioner's plea was involuntary.

Rule 11(d) of the West Virginia Rules of Criminal Procedure provides: 2 Ensuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.

The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the state and the defendant or the defendant's attorney. Petitioner's trial counsel stated at the plea hearing that prior to that hearing he explained to petitioner her rights, what the State would need to prove to convict her, what evidence the State had.

Petitioner's counsel represents that she made a voluntary and knowledgeable plea. Additionally, petitioner testified at the plea hearing that she was ready to enter the guilty plea, that she read and discussed the plea with counsel, that the plea reflects the agreement she had with the State regarding the case's disposition, and that she understood she and the State were bound by the terms of the plea agreement.

Petitioner further stated that no one had made any promises to get her to plead guilty, that no one had promised leniency for her to plead guilty, that no one had guaranteed probation, and that the plea was signed as a free and voluntary act.

The circuit court engaged in a long colloquy with petitioner and met the requirements of due process before concluding that petitioner knowingly, intelligently, and voluntarily waived her rights. Therefore, for the foregoing reasons, we affirm the circuit court's February 1, 2013, sentencing order. Affirmed. ISSUED: March 31, 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 3