

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Eric Kell v. Donnie Ames, Superintendent, Mt. Olive Correctional Complex

Eric Kell v. Donnie Ames, Superintendent, Mt. Olive Correctional Complex · No. 21-0978 · Decided June 13, 2023

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the denial of Eric Kell’s petition for a writ of habeas corpus. The court held that Kell’s unconditional guilty plea waived his challenge to the suppression ruling and that he also waived arguments concerning alleged tampering with his recorded statement and the effect of Xanax because those grounds were not properly raised below.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Per Curiam; Chief Justice Elizabeth D. Walker; Justice Tim Armstead; Justice John A. Hutchison; Justice William R. Wooton; Justice C. Haley Bunn
JURISDICTION	West Virginia
DECIDED	June 13, 2023
DOCKET	21-0978
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed the Circuit Court of Mercer County's order denying his petition for a writ of habeas corpus after an omnibus evidentiary hearing.
STANDARD OF REVIEW	The final order and ultimate disposition in a habeas corpus action are reviewed for abuse of discretion, underlying factual findings are reviewed for clear error, and questions of law are reviewed de novo.
PRECEDENTIAL VALUE	published
PARTIES	Eric Kell v. Donnie Ames, Superintendent, Mt. Olive Correctional Complex

TOPICS

state post-conviction relief

habeas corpus

preservation of error

suppression of evidence

appellate procedure

PRACTICE AREAS

state post-conviction relief

criminal procedure

appellate procedure

evidence

QUESTIONS PRESENTED

1. Whether the circuit court abused its discretion by denying habeas relief based on the alleged tampering with a recorded law-enforcement interview and Kell's alleged impairment by Xanax.
2. Whether Kell's unconditional guilty plea waived his challenge to the suppression ruling and other antecedent nonjurisdictional constitutional or statutory claims.
3. Whether Kell waived the tampering and medication arguments by failing to raise them in the circuit court.

HOLDINGS

1. A knowing, voluntary, and intelligent unconditional guilty plea waives antecedent constitutional and statutory violations that do not implicate the court's jurisdiction, including a challenge to the court's ruling on a motion to suppress.
2. Arguments not raised in the habeas petition or during the omnibus habeas hearing are waived and cannot support appellate habeas relief.

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. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review.” (at 1)

“If any principle is well settled in this State, it is that, in the absence of special circumstances, a guilty plea waives all antecedent constitutional and statutory violations save those with jurisdictional consequences.” (at 1)

“our law clearly supports the proposition that any grounds not raised in the petition for habeas corpus are deemed waived.” (at 2)

FACTUAL BACKGROUND

Kell pleaded guilty to twelve offenses involving sexual abuse and third-degree sexual assault after an extensive plea colloquy in which the circuit court found that his plea was freely, voluntarily, intelligently, knowingly, and understandably entered. He later sought habeas relief, asserting multiple grounds, but on appeal focused on an allegation that a law-enforcement interview recording had been tampered with and that he was under the influence of Xanax when he gave his statement. The circuit court denied habeas relief after an omnibus

evidentiary hearing, and the appellate court noted that Kell had neither raised the tampering and medication arguments in his habeas petition or hearing nor filed a direct appeal.

PROCEDURAL HISTORY

Kell pleaded guilty to six counts of sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child and six counts of third-degree sexual assault. He was sentenced and did not file a direct appeal, instead seeking habeas relief in the Circuit Court of Mercer County. After conducting an omnibus evidentiary hearing, the circuit court denied relief, and Kell appealed. The Supreme Court of Appeals of West Virginia affirmed by memorandum decision without oral argument.

DISPOSITION

affirmed

CASES CITED

- Mathena v. Haines, 219 W. Va. 417, 633 S.E.2d 771 (2006)
- Meadows v. Mutter, 243 W. Va. 211, 842 S.E.2d 764 (2020)
- State v. Greene, 196 W. Va. 500, 473 S.E.2d 921 (1996)
- State v. Bennett, 179 W. Va. 464, 370 S.E.2d 120 (1988)
- Lewis v. Ames, 242 W. Va. 405, 836 S.E.2d 56 (2019)

OPINION

PER CURIAM.

FILED June 13, 2023 STATE OF WEST VIRGINIA EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS SUPREME COURT OF APPEALS OF WEST VIRGINIA
Eric Kell, Petitioner Below, Petitioner vs.) No. 21-0978 (Mercer County 20-C-130DS) Donnie
Ames, Superintendent, Mt. Olive Correctional Complex, Respondent Below, Respondent
MEMORANDUM DECISION Petitioner Eric Kell appeals the Circuit Court of Mercer County's
November 5, 2011, order denying his petition for a writ of habeas corpus.¹ Upon our review, we
determine that oral argument is unnecessary and that a memorandum decision affirming the circuit
court's order is appropriate.

See W. Va. R. App. Proc. 21. Petitioner pled guilty² to six counts of sexual abuse by a parent, guardian, custodian or person in a position of trust to a child and six counts of third-degree sexual assault. He was sentenced and did not file a direct appeal. Instead, petitioner filed a petition for a writ of habeas corpus.³ The court conducted an omnibus evidentiary hearing, after which it denied petitioner habeas relief.

Petitioner now appeals from that order. 1 Petitioner appears by counsel Robert P. Dunlap, II. Respondent appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General

Gail V. Lipscomb. 2 At the plea hearing, the State offered a summary of the evidence it would present at trial to support petitioner's convictions. Petitioner agreed with the State's summary and advised the court that he was entering a guilty plea because he was "in fact guilty." Moreover, petitioner confirmed he understood that by entering a guilty plea he was waiving any non-jurisdictional defects in the criminal proceeding against him.

After an extensive colloquy, the court accepted petitioner's guilty plea, finding that there was a factual basis for the plea and that petitioner entered his plea "freely, voluntarily, intelligently, knowingly and understandably." 3 Petitioner asserted the following claims for habeas corpus relief: (1) lack of mental competency at the time of the crime; (2) lack of mental competency at time of trial; (3) ineffective assistance of counsel; (4) cumulative error; (5) consecutive sentence for the same transaction; (6) (continued...) 1 In this appeal, petitioner argues that the court "erred by abusing its discretion in denying [p]etitioner's claim regarding [p]etitioner's allegation that the tape recording of his interview by law enforcement was tampered with after the fact [and] that [p]etitioner was under the influence of Xanax in violation of [p]etitioner's Constitutional rights" at the time that he provided the statement.

Our review is guided by the following standard: 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 standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). We have repeatedly held, "[o]n an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court." *Meadows v. Mutter*, 243 W. Va. 211, 218-19, 842 S.E.2d 764, 771-72 (2020) (citation omitted).

At the outset, we acknowledge that petitioner was convicted upon his knowing, voluntary, and intelligent unconditional guilty plea. We have noted that "[i]f any principle is well settled in this State, it is that, in the absence of special circumstances, a guilty plea waives all antecedent constitutional and statutory violations save those with jurisdictional consequences." *State v. Greene*, 196 W. Va. 500, 505, 473 S.E.2d 921, 926 (1996); See also, *State v. Bennett*, 179 W. Va. 464, 475, 370 S.E.2d 120, 131 (1988) ("the defendant waives all procedural objections except the jurisdiction of the court and the voluntariness of his plea when he pleads guilty.").

Accordingly, inasmuch as petitioner pled guilty, we find that petitioner waived any right to complain about the court's ruling on his motion to suppress. Moreover, petitioner did not raise these claims with the circuit court.

Although petitioner claimed in his motion to suppress that his statement was not provided “knowingly, intelligently and voluntarily and was the product of coercion in a manner inconsistent with constitutional principles,” he did not argue in his habeas petition or during his omnibus habeas hearing that his recorded statement had been tampered with as a ground for relief.⁴ Additionally, petitioner did not argue below that he was not capable of giving a statement to law enforcement because he took unfulfilled plea bargains; (7) erroneous information in the pre-sentence report; (8) non-disclosure of grand jury minutes; and (9) mistaken advice of counsel as to parole or probation eligibility.

4 On cross-examination at the omnibus hearing, petitioner’s trial counsel testified that he did not recall petitioner raising any concerns related to the statement nor did he hear any breaks or pauses in the recording.

Although petitioner’s habeas counsel asked a few fleeting cross- examination questions that referenced the possibility of alleged tampering with petitioner’s statement, petitioner did not raise this in his petition or at the omnibus hearing.

Accordingly, the habeas court did not consider tampering of petitioner’s statement as a ground for habeas relief. 2 Xanax or another medication.⁵ It is well established that “our law clearly supports the proposition that any grounds not raised in the petition for habeas corpus are deemed waived.” *Lewis v. Ames*, 242 W. Va. 405, 410, 836 S.E.2d 56, 61 (2019).

Accordingly, because petitioner did not raise these issues in the circuit court, we find that he waived these arguments. For the foregoing reasons, we affirm. Affirmed. ISSUED: June 13, 2023
CONCURRED IN BY: Chief Justice Elizabeth D. Walker Justice Tim Armstead Justice John A. Hutchison Justice William R. Wooton Justice C. Haley Bunn 5 At his suppression hearing, petitioner argued the opposite — that he was not adequately medicated at the time he gave his statement to law enforcement.