

SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Ross Jenkins v. J.T. Binion, Superintendent, Huttonsville
Correctional Facility**

No. 19-0507 (W. Va. Aug. 28, 2020) (memorandum decision) · No. No. 19-0507 · Decided August 28, 2020

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS Ross Jenkins, Petitioner Below, Petitioner FILED August 28, 2020 vs.) No. 19-0507 (Marion County 19-C-34) EDYTHE NASH GAISER, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA J.T. Binion, Superintendent, Huttonsville Correctional Center, Respondent Below, Respondent MEMORANDUM DECISION Petitioner Ross Jenkins, self-represented litigant, appeals the April 29, 2019, order of the Circuit Court of Marion County denying his fifth petition for a writ of habeas corpus.

Respondent J.T. Binion, Superintendent, Huttonsville Correctional Center, by counsel Karen C. Villanueva- Matkovich, filed a summary response in support of the circuit court's order. Petitioner filed a reply. 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, the Court finds no substantial question of law and no prejudicial error.

For these reasons, a memorandum decision affirming the circuit court's orders is appropriate under Rule 21 of the Rules of Appellate Procedure. On October 4, 1995, petitioner was convicted by a Marion County Circuit Court jury of one count of burglary and two counts of second-degree sexual assault. Thereafter, on November 8, 1995, petitioner was found by a separate jury to be a habitual offender pursuant to the recidivist statute, West Virginia Code §§ 61-11-18 and 61-11-19.

In subsequent proceedings not relevant here, by a resentencing order entered on December 12, 2018, 1 petitioner was sentenced to consecutive terms of incarceration of one to fifteen years for one count of burglary, of ten to twenty-five years for one count of second-degree sexual assault, and of a life recidivist sentence— 1 Rule 35(a) of the West Virginia Rules of Criminal Procedure provides, in pertinent part, that “[t]he court may correct an illegal sentence at any time[.]” 1 with the possibility of parole after fifteen years—on the second count of second-degree sexual assault with credit for 8,506 days served in prison.² On March 27, 1997, petitioner filed his first petition for a writ of habeas corpus in the circuit court.

An attorney was appointed to represent petitioner, and counsel filed an amended petition on August 13, 1998. In the amended petition, petitioner alleged that the State used perjured testimony by the arresting officer before the grand jury.³ Following omnibus hearings in 1999 and 2000, by order entered on October 5, 2001, the circuit court denied the amended petition.

Petitioner appealed the circuit court's October 5, 2001, order, and this Court refused the appeal on September 19, 2002. Subsequently, on December 18, 2017, petitioner filed the instant habeas petition—his fifth—raising the following ground for relief: At no [time] before, during, after the [February 22, 1999,] habeas hearing[,] did... [p]etitioner's habeas counsel... make a motion to the habeas court for a new trial or dismissal of the charges in light of [the arresting officer]'s testimony at the grand jury that indicated an illegal pretrial identification had been made by the alleged victim[.]

By order entered on April 29, 2019, the circuit court found that it could rule on the instant habeas petition without a hearing. The circuit court first denied petitioner's claim pursuant to the doctrine of res judicata, finding that the claim raised in the instant petition was previously adjudicated in petitioner's first habeas proceeding.

The circuit court further denied the claim on its merits pursuant to the applicable test for determining ineffective assistance of counsel. Petitioner now appeals the circuit court's April 29, 2019, order denying the instant petition. This Court reviews a circuit court order denying a habeas petition under 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). ² On January 11, 2019, petitioner filed an appeal of the circuit court's December 12, 2018, resentencing order, and this Court affirmed the December 12, 2018, order in *State v. Jenkins*, No. 19-0026, 2020 WL 3408320 (W.

Va. June 18, 2020) (memorandum decision). ³ The other grounds for habeas relief raised in the August 13, 1998, amended petition were: (1) ineffective assistance of trial counsel; (2) double jeopardy; (3) unconstitutional evidentiary rulings; (4) inadequate jury instructions; (5) prejudicial statements by the prosecution; (6) insufficient evidence; (7) suppression of helpful evidence; (8) irregularities in petitioner's arrest; (9) failure to produce the indictment to petitioner; and (10) non-production of witness notes.

² Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016). However, because we have before us the denial of petitioner's fifth habeas petition, we first consider the application of Syllabus Point 4 of *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), in which this

Court held, in pertinent part, that “[a] prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known,” but that “an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing[.]” On appeal, petitioner argues that the circuit court erred in denying the instant habeas petition prior to a hearing and the appointment of counsel because he raised the issue of ineffective assistance of habeas counsel.

Respondent counters that the circuit court properly denied the petition. We agree with respondent. In *Anstey*, we reiterated that: “[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.’ Syllabus Point 1, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973).” Syl.

Pt. 2, *White v. Haines*, 215 W. Va. 698, 601 S.E.2d 18 (2004). Syl. Pt. 3, *Anstey*, 237 W. Va. at 412, 787 S.E.2d at 865. Here, the circuit court noted that the instant petition was petitioner’s fifth habeas petition and found that it could rule on the petition without a hearing for the reasons noted in its order.

Having reviewed the circuit court’s April 29, 2019, “Final Order Denying Relief Sought In Petition For Writ Of Habeas Corpus,” we hereby adopt and incorporate the circuit court’s well-reasoned findings and conclusions, which we find address petitioner’s assignments of error.⁴ The Clerk is directed to attach a copy of the April 29, 2019, order to this memorandum decision.⁵ Accordingly, we conclude that the circuit court’s denial of the instant petition did not constitute an abuse of discretion.

For the foregoing reasons, we affirm the circuit court’s April 29, 2019, order denying petitioner’s fifth petition for a writ of habeas corpus. Affirmed. 4 To the extent that petitioner raises on appeal claims of ineffective assistance of habeas counsel not presented to the circuit court, we decline to address those issues. See *Watts v. Ballard*, 238 W. Va. 730, 735 n.7, 798 S.E.2d 856, 861 n.7 (2017) (stating that “[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance”) (quoting Syl.

Pt. 2, *Sands v. Sec. Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958)). 5 The victim’s name has been redacted. 3 ISSUED: August 28, 2020 CONCURRED IN BY: Chief Justice Tim Armstead Justice Margaret L. Workman Justice Elizabeth D. Walker Justice Evan H. Jenkins Justice John A. Hutchison 4