

# SUPREME COURT OF APPEALS OF WEST VIRGINIA

## Ryan Nenigar v. David Ballard, Warden

No. 13-0385 (Hampshire County 06-C-07) (W. Va. Nov. 22, 2013) · No. No. 13-0385 · Decided November 22, 2013

### SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the denial of Ryan Nenigar’s petition for post-conviction habeas corpus relief. The court rejected claims concerning ineffective assistance of counsel, admission of prior-bad-acts evidence, sufficiency of the evidence, preservation of cinder-block evidence, prosecutorial misconduct, and jury voir dire. The court adopted the circuit court’s findings and conclusions and issued the decision as a memorandum decision under Rule 21.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                       |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Appeals of West Virginia                                                                                                                                                                                                                                             |
| WRITING FOR THE COURT | Chief Justice Brent D. Benjamin; Justice Robin Jean Davis; Justice Margaret L. Workman; Justice Menis E. Ketchum; Justice Allen H. Loughry II                                                                                                                                         |
| JURISDICTION          | West Virginia                                                                                                                                                                                                                                                                         |
| DECIDED               | November 22, 2013                                                                                                                                                                                                                                                                     |
| DOCKET                | No. 13-0385                                                                                                                                                                                                                                                                           |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                              |
| PROCEDURAL POSTURE    | Petitioner appealed the Circuit Court of Hampshire County's denial of his amended petition for a writ of habeas corpus challenging his first-degree murder and conspiracy convictions.                                                                                                |
| STANDARD OF REVIEW    | Habeas appeals receive a three-prong review: the final order and ultimate disposition are reviewed for abuse of discretion, underlying factual findings for clear error, and questions of law de novo. Ineffective-assistance claims are governed by the two-pronged Strickland test. |
| PRECEDENTIAL VALUE    | memorandum decision; nonprecedential status not expressly stated in the opinion text                                                                                                                                                                                                  |
| PARTIES               | Ryan Nenigar v. David Ballard, Warden                                                                                                                                                                                                                                                 |

### TOPICS

habeas corpus

state post-conviction relief

ineffective assistance

evidence

appellate procedure

## PRACTICE AREAS

criminal post-conviction

habeas corpus

criminal procedure

evidence

ineffective assistance of counsel

## QUESTIONS PRESENTED

1. Whether trial counsel provided ineffective assistance sufficient to warrant habeas relief.
2. Whether evidence of prior bad acts, including abandonment of Nenigar's vehicle and an incident in which he choked his girlfriend, was properly admitted under West Virginia Rule of Evidence 404(b).
3. Whether the evidence was sufficient to sustain the first-degree murder and conspiracy convictions.
4. Whether the State violated its duty to preserve material evidence by failing to procure and produce the cinder blocks.
5. Whether the prosecutor committed misconduct by referring to defense counsel as a 'jack in the box.'
6. Whether the trial court should have declared a mistrial or polled the jury after a juror stated that the juror knew Nenigar 'from a previous placement.'

## HOLDINGS

1. A habeas appeal is reviewed under a three-prong standard: abuse of discretion for the final order and ultimate disposition, clear error for underlying factual findings, and de novo review for questions of law.
2. Nenigar failed to establish ineffective assistance of counsel warranting habeas relief, and the circuit court properly found that trial counsel was effective.
3. The prior-bad-acts evidence concerning abandonment of Nenigar's vehicle and his prior choking of his girlfriend was properly admitted under West Virginia Rule of Evidence 404(b).
4. The evidence was sufficient to sustain Nenigar's convictions for first-degree murder and conspiracy.
5. Nenigar was not entitled to habeas relief based on the State's failure to procure and produce the cinder blocks because the record did not show negligence in extracting or preserving them.
6. The prosecutor's reference to defense counsel as a 'jack in the box' did not warrant relief because the comment was made outside the jury's presence.
7. The voir dire was proper, and the isolated statement that a juror knew Nenigar 'from a previous placement' did not establish prejudice or require a mistrial or jury poll.

## 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."* (1)

*"Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have*

*been different.” (1)*

## FACTUAL BACKGROUND

Nenigar was convicted of first-degree murder after evidence indicated that he, Stephen Cooper, and Scott Cooper picked up the victim in Nenigar's vehicle, killed her, and attempted to dispose of her body using concrete blocks and a lake before leaving the body in a Virginia creek. The Cooper brothers testified that Nenigar was the mastermind and choked the victim. In his habeas proceedings, Nenigar challenged counsel's effectiveness, admission of prior-bad-acts evidence, sufficiency of the evidence, preservation of cinder blocks, prosecutorial conduct, and jury voir dire.

## PROCEDURAL HISTORY

A jury found Nenigar guilty of first-degree murder on August 4, 2004. His direct appeal, motion for a new trial, and appeal from denial of the new-trial motion were unsuccessful. After appointed counsel filed an amended habeas petition, the circuit court denied relief without a hearing on February 6, 2013, and the Supreme Court of Appeals affirmed.

## DISPOSITION

affirmed

## CASES CITED

- 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)
- Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)

## OPINION

Ryan Nenigar v. David Ballard, Warden

PER CURIAM.

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

Ryan Nenigar, FILED Petitioner Below, Petitioner November 22, 2013

RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

vs) No. 13-0385 (Hampshire County 06-C-07) OF WEST VIRGINIA David Ballard, Warden,  
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Ryan Nenigar, by counsel Jonathan G. Brill, appeals the February 6, 2013, order of the Circuit Court of Hampshire County denying his petition for writ of habeas corpus. Respondent

State of West Virginia, by counsel Scott E. Johnson, filed a response in support of the circuit court's order. 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 is appropriate under Rule 21 of the Rules of Appellate Procedure. Petitioner was found guilty of first-degree murder by a jury on August 4, 2004. In the underlying crime, petitioner, Stephen Cooper and Scott Cooper were found to have picked up the victim in petitioner's vehicle. The Coopers testified against petitioner, alleging that he was the mastermind in the crime and choked the victim to death. They also alleged that he had the idea to sink the victim's body in a lake with concrete blocks, but when they tried to do so, they failed and dumped the blocks into the lake. They then took her body to a creek in Virginia and dumped it there. Stephen Cooper testified that when the body was dumped in the creek, he thought he heard the crack of the victim's head hitting a rock. Petitioner appealed his conviction, but his appeal was denied in September of 2005. Petitioner then moved for a new trial, which was denied, and his appeal of the order denying the motion for a new trial was likewise denied. Petitioner filed a petition for writ of habeas corpus and counsel was appointed. Counsel filed an amended petition for writ of habeas corpus, which the circuit court denied on February 6, 2013, after finding that a hearing was not necessary. Petitioner appeals from this denial. 1 This Court reviews appeals of circuit court orders denying habeas corpus relief 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." 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). The following standard is applied to claims concerning ineffective assistance of counsel: In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). On appeal, petitioner sets forth five assignments of error. First, petitioner argues that the lower court erred in finding that he received effective assistance of counsel at trial, as trial counsel acted in a deficient manner, preventing petitioner from receiving a fair trial. Next, petitioner argues that the lower court erred in finding that the trial court properly admitted evidence of prior bad acts under Rule 404(b) of the West Virginia Rules of Evidence. Petitioner also argues that the lower court erred in finding that the State presented sufficient evidence at trial to sustain convictions of first-degree murder and conspiracy. Further,

petitioner argues that the lower court erred in finding that the State did not breach its duty in failing to preserve material evidence prior to trial and that the prosecuting attorney abandoned his quasi-judicial role, which prevented petitioner from receiving a fair trial. Finally, petitioner argues that the lower court erred in failing to declare a mistrial or poll the jury during the voir dire process based upon prejudicial statements made by a juror in the presence of other jury members. Upon our review of the record and the briefs on appeal, we find no error or abuse of discretion by the circuit court. All of the issues petitioner raises on appeal were issues addressed and discussed by the circuit court in its order denying petitioner post-conviction habeas corpus relief. The circuit court properly found that counsel was effective in his representation of petitioner, and that the prior bad acts, specifically the abandonment of petitioner's vehicle and a prior incident wherein he choked his girlfriend, were properly admitted under Rule 404(b). Further, the evidence was sufficient to sustain the conviction for first-degree murder and conspiracy. 2 Petitioner contends that the State failed to preserve material evidence by not procuring and producing the cinder blocks at trial. As to this claim, the circuit court properly concluded that there was no evidence that the State was negligent in extracting the cinder blocks from the lake or that the State failed to properly preserve the evidence. The circuit court also found no prosecutorial misconduct when the prosecutor referred to defense counsel as a "jack in the box" based on repeated objections, noting that the comment petitioner relies upon was made outside of the presence of the jury. Finally, the circuit court found that voir dire was proper and that the statement that one juror knew petitioner "from a previous placement" did not prejudice him, as none of the jurors became biased against petitioner based on this isolated comment. Having reviewed the circuit court's "Order Denying Petitioner's Petition for Writ of Habeas Corpus," entered on February 6, 2013, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's opinion letter and order to this memorandum decision. For the foregoing reasons, we affirm. Affirmed. ISSUED: November 22, 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 3