

IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA

COPY

STATE OF WEST VIRGINIA ex rel.
SHANE SHELTON
PETITIONER BELOW, APPELLANT

APPEAL NO.: 33322

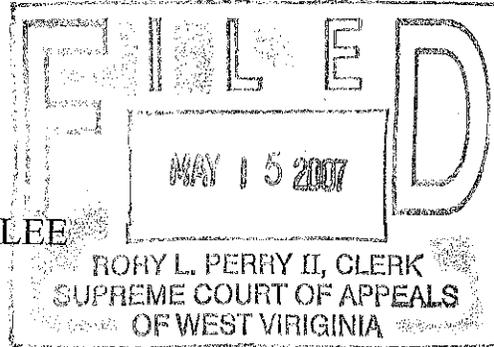
CASE NO.: 00-C-23

vs.

HOWARD PAINTER, WARDEN
MOUNT OLIVE CORRECTIONAL CENTER,
RESPONDENT BELOW, APPELLEE

CIRCUIT COURT OF
OHIO COUNTY,
WEST VIRGINIA

BRIEF OF APPELLEE



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**TO: THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF
APPEALS OF THE STATE OF WEST VIRGINIA**

**HON. JOSEPH P. ALBRIGHT, CHIEF JUSTICE
HON. ROBIN JEAN DAVIS, JUSTICE
HON. LARRY V. STARCHER, JUSTICE
HON. BRENT D. BENJAMIN, JUSTICE
HON. ELLIOTT E. MAYNARD, JUSTICE**

RORY L. PERRY, II, CLERK

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PROCEEDINGS/RULINGS and UNDERLYING FACTS

The case below began on August 15, 1995, wherein, the Appellant, Shane Shelton, shot and killed Kenny Lawson in Ohio County, West Virginia. Mr. Shelton waited for Mr. Lawson to exit the apartment where he was located and shot him with a 9 millimeter firearm at least five times. This brutal, cold-blooded murder was witnessed by at least two different eye witnesses. Mr. Shelton fled the jurisdiction and was ultimately apprehended in the State of Georgia over two years after the murder occurred. Subsequently, the Appellant was tried for the murder of Mr. Lawson and was convicted of First Degree Murder without a recommendation of mercy. As a result, Mr. Shelton was sentenced to life in prison without mercy by the trial Court. The Appellant filed a petition for appeal on October 1, 1998. The petition for appeal was refused by this Honorable Court on or about February 16, 1999. Mr. Shelton next filed a Writ of Habeas Corpus on January 13, 2000 and an amended petition was filed by counsel on July 12, 2005. Furthermore, an Amended and Revised Petition for Writ of Habeas Corpus was filed on April 7, 2006. The Circuit Court scheduled an Evidentiary Hearing on the issue of ineffective assistance of counsel and the same was conducted on April 7, 2006 and April 10, 2006. The Circuit Court entered Findings of Fact and Conclusion of Law on June 16, 2006 denying the Appellant's Petition for Writ of Habeas Corpus. In so denying the Writ, the Court made specific findings that the Appellant's trial counsel were not ineffective in their representation of Mr. Shelton. The Court went on to make additional findings that even if it were found that the trial counsel were ineffective, the Appellant could not prove any prejudice as a result thereof. From said Findings of Fact and Conclusion of Law the Appellant makes this appeal.

STANDARD OF REVIEW

“A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” Syl. Pt.4, State ex. rel. McMannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979). Thus, a habeas appeal does not authorize this Court to redetermine credibility of witnesses and lawyers whose demeanor has been observed by the jury and/or the trial court in the first instance. Marshall v. Lonberger, 459 U.S. 422, 434-35 (1983); Syl. Pt.2, State v. Bailey, 151 W.Va. 796, 155 S.E.2d 850 (1967).

The instant matter presents as an appeal of a circuit court's denial of a petition for writ of habeas corpus as authorized by W. Va. Code §53-4A-9 (1967). “On 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.” Syl. Pt. 2, Perdue v. Coiner, 156 W. Va. 467, 194 S.E.2d 657 (1973). In State ex rel. Valentine v. Watkins, 208 W. Va. 26, 31, 537 S.E.2d 647, 652 (2000), the Court noted that courts are typically afforded broad discretion when determining whether sufficient grounds exist to issue a writ of habeas corpus. In reviewing challenges to the findings and conclusions of the circuit court from a habeas proceeding, this Court applies a two-pronged deferential standard of review. The Court will review the final order and the ultimate disposition under an abuse of discretion standard. Findings of fact will not be set aside on appeal unless they are clearly wrong. Syl. Pt. 1, State ex rel. Postelwaite v. Bechtold, 158 W. Va. 479, 212 S.E.2d 69 (1975), cert. denied, 424 U.S. 909, 96 S.Ct. 1103, 47 L.E.2d 312 (1976). Questions of law are subject to *de novo* review. Phillips v. Fox, 193 W.Va. 657, 458 S.E.2d 327 (1995); Phillip Leon M. v. Greenbrier County Bd. of Educ., 199 W. Va. 400, 404, 484 S.E.2d 909, 913 (1996), modified

on other grounds by Cathe A. v. Doddridge County Bd. Of Educ., 200 W. Va. 521, 490 S.E.2d 340 (1997).

DISCUSSION OF LAW

Claims of ineffective assistance of counsel are governed by the two-prong test established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and subsequently adopted in State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). In syl. pt. 5 of Miller, supra, the Court adopted the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 696 (1984), stating:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

This Court has recognized that the Sixth Amendment to the Constitution of the United States and Article III, § 14, of the Constitution of West Virginia not only assure the "assistance of counsel" to a defendant in a criminal proceeding but also assure that such a defendant receives competent and effective assistance of counsel. As stated in Cole v. White, 180 W.Va. 393, 395, 376 S.E.2d 599, 601 (1988); "the right of a criminal defendant to assistance of counsel includes the right to effective assistance of counsel." See also State ex rel. Levitt v. Bordenkircher, 176 W.Va. 162, 167, 342 S.E.2d 127, 133 (1986); State ex rel. Wine v. Bordenkircher, 160 W.Va. 27, 30, 230 S.E.2d 747, 750 (1976); State ex rel. Favors v. Tucker, 143 W.Va. 130, 140, 100 S.E.2d 411, 416 (1957), cert. denied, 357 U.S. 908, 78 S. Ct. 1153, 2 L. Ed. 2d 1158 (1958); State ex rel. West Virginia-Pittsburgh

Coal Co. v. Eno, 135 W.Va. 473, 482, 63 S.E.2d 845, 850 (1951).

In West Virginia, claims of ineffective assistance of counsel are to be governed by the two-prong test established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See Miller. Failure to meet the burden of proof imposed by either part of the Strickland/Miller test is fatal to a habeas petitioner's claim.

The first prong of this test requires that a petitioner identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The petitioner's burden in this regard is heavy, as there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." 466 U.S. at 689, 104 S. Ct. at 2065. In syl. pt. 6 of Miller, the Court further explained:

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

The Strickland Court pointed out that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. Likewise, this Court has emphasized that counsel's strategic decisions must rest upon a reasonable investigation.

The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.

Additionally, in Syl. pt. 3, State ex rel. Daniel v. Legursky, 195 W.Va. 314, 465 S.E.2d 416 (1995), this Court stated, "Courts applying the Strickland standard have found no difficulty finding ineffective assistance of counsel where an attorney neither conducted a reasonable investigation, nor demonstrated a strategic reason for failing to do so."

Further, in Syl. pt. 21 of State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445, (1974), this Court stated that "a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused."

In determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, the Circuit Court should not view counsel's conduct through the lens of hindsight. "Courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion." Clanton v. Bair, 826 F.2d 1354, 1358 (4th Cir. 1987), cert. denied, 484 U.S. 1036, 108 S. Ct. 762, 98 L. Ed. 2d 779 (1988). Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices.

The second or "prejudice" requirement of the Strickland / Miller test looks to whether counsel's deficient performance adversely affected the outcome in a given case. Furthermore, prejudice must be proven by a preponderance of the evidence, "one who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syl. pt. 22, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

In the instant case, the Appellant alleges that his counsel were ineffective by breaching their duty of loyalty to Mr. Shelton in the closing argument. The trial court found that trial counsel did not breach their duty of loyalty to Mr. Shelton in that said portion of the closing argument in question was trial strategy utilized in an attempt to maintain credibility with the jury to have a better chance of obtaining a favorable verdict. The trial court noted that the testimony of trial counsel supported such a finding. Both trial counsel testified that the comments made by Mr. Moses during the closing argument were made to build and maintain credibility with the jury. This was an attempt to endear themselves to the jury, which was a reasonable trial strategy. See Tr. Pg. 155 ln. 14- pg. 156 ln. 6 pg. 199 ln. 24- pg. 201 ln. 5. As a result of the overwhelming evidence of the guilt of Mr. Shelton, as well as the "confession" made by Mr. Shelton during his cross examination, counsel felt that they had no other reasonable option than to simply attempt to obtain a mercy recommendation from the jury. This certainly comes within the parameters of "trial strategy" which should not be second guessed by this Court. When trial counsel's closing argument is read in it's entirety, and a single portion not pulled out of context, it is clear that the trial court's finding was appropriate. Furthermore, trial counsel testified at the evidentiary hearing that they each met with Mr. Shelton between nine and fourteen different occasions, with most visits being around an hour each. During

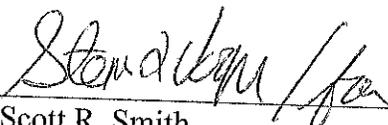
these meetings, the status of the case and the mounting evidence of guilt were discussed with Mr. Shelton. See Tr. Pg. 140 ln. 18- pg 144 ln. 7; Tr. Pg.191 ln 9-16. Further, trial counsel testified that Mr. Shelton was involved in the decision making of the trial strategy utilized during the trial. Tr. Pg. 146 ln 20- pg. 147 ln. 10.

Finally, assuming *arguendo* that this Court finds that trial counsel was ineffective, the Appellant can not show that he was prejudiced by the conduct. As can be seen from the trial transcript in the underlying matter, the State's case against the Appellant was airtight. There was nothing that any lawyer could have done that would have prevented Mr. Shelton from being convicted of Murder in the First Degree and sentenced to life in the penitentiary without mercy.

PRAYER FOR RELIEF

WHEREFORE, the Appellee respectfully prays that this Honorable Court affirm the judgment of the Circuit Court of Ohio County.

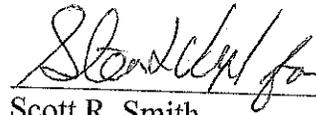
RESPECTFULLY SUBMITTED,



Scott R. Smith
Ohio County Prosecuting Attorney

CERTIFICATE BY ATTORNEY

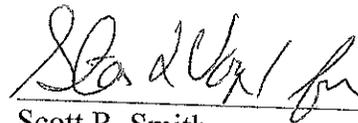
I hereby certify, pursuant to Rule 4(A)(c) of the West Virginia Rules of Appellate Procedure, that the facts alleged herein are faithfully represented and that they are accurately presented to the best of my ability.



Scott R. Smith
Ohio County Prosecuting Attorney

CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF OF APPELLEE** was had upon the Appellant, Shane Shelton, by delivering a true copy thereof, to his attorney, Timothy Cogan, this 14th day of May, 2007, by U.S. Mail, to his last known address of 1413 Eoff Street, Wheeling, West Virginia 26003.



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