

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

GARY ALLEN GIBSON,

Petitioner,

vs.

CIVIL ACTION NO.: 93-C-2290
JUDGE DAVID M. PANCAKE

HOWARD PAINTER, Warden,
Mt. Olive Correctional Facility,

Respondent.

ADELL CHANDLER
CIRCUIT CLERK
CABELL WV

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FILED

OPINION ORDER GRANTING WRIT OF HABEAS CORPUS

This matter came before the Court for an omnibus habeas corpus hearing. The Court received evidence on the 7th day of June, 2001. Petitioner appeared personally and through counsel, R. Lee Booten, II. Senior Assistant Attorney General Allen H. Loughry, II, represented Respondent.

The Court has considered Petitioner's "Petition for Habeas Corpus," "Amended Petition for Writ of Habeas Corpus *ad Subjiciendum*," all subsequent amendments, and Petitioner's Losh checklist. (Attached as Exhibit 1). The Court has studied the Petitioner's brief and the Respondent's memorandum in opposition. The Court has considered the testimony and exhibits presented in the omnibus hearing held before this Court, has read the record of the underlying action, and has reviewed relevant legal authorities. As a result of these deliberations, and for the reasons set forth in the following opinion, the Court has concluded that the Petitioner is entitled to relief based on the doctrine of cumulative error as discussed in this Opinion Order.

I. PROCEDURAL HISTORY

Petitioner started down the not-so-golden brick road in June 15, 1978, when he was convicted of voluntary manslaughter in the Circuit Court of Wood County, and was subsequently sentenced to the West Virginia Penitentiary for an indeterminate term of imprisonment of one to five years. On February 19, 1982, the Petitioner entered a plea of guilty to the offense of burglary in the Circuit Court of Wood County. He was sentenced, upon his conviction, to an indeterminate term of imprisonment of one to fifteen years.

On August 5, 1985, the Petitioner was again convicted of burglary in the Circuit Court of Wood County. Thereafter, the Prosecuting Attorney for Wood County filed a recidivist information under W.Va. Code 61-11-18 (1943), seeking the imposition of a life sentence upon the Petitioner. On September 23, 1985, after a trial by jury on the recidivist information, the Petitioner was found guilty, and the Circuit Court of Wood County sentenced him to life imprisonment. The Petitioner was subsequently charged with conspiracy to commit murder, an offense which occurred while he was confined in the West Virginia Penitentiary, and is the same offense that spawned this habeas corpus proceeding. The conspiracy case was transferred from Marshall County on a motion for change of venue. Subsequently, on January 19, 1989, the Petitioner was convicted by a jury in the Circuit Court of Cabell County. On February 7, 1989, another recidivist information was filed against the Petitioner based on the felonies contained within the first recidivist information. On April 17, 1989, under a plea agreement, the Petitioner agreed to acknowledge his three previous felony convictions and waived the recidivist trial as provided for in W.Va. Code 61-11-19 (1943). Subsequently, by an Order dated May 23,

1989, the Petitioner was given a second life recidivist sentence to run consecutive to the earlier life recidivist sentence. The Petitioner appealed the conspiracy conviction to the West Virginia Supreme Court of Appeals. The Court denied the petition for appeal on April 10, 1991.

Undaunted, on July 3, 1991, Petitioner filed an original habeas corpus petition in the West Virginia Supreme Court of Appeals challenging his second life recidivist sentence on double jeopardy grounds. The Court denied the Petition on March 5, 1992, in Gibson v. Legursky, 415 S.E.2d 457 (W.Va. 1992) by holding that the second life recidivist sentence did not violate principles of the double jeopardy.

On September 27, 1993, Petitioner turned his attention to the Circuit Court of Marshall County by filing a post-conviction habeas corpus petition challenging the conspiracy conviction. On October 7, 1993, the Marshall County Circuit Court found that Cabell County, the county of conviction, should play host to the omnibus hearing.

After a period of dormancy, judicial ascensions, Respondent counsel changes, two presidential elections, and several continuances, Petitioner attended and testified at his omnibus hearing, represented by counsel, on June 7, 2001. Counsel for Petitioner and Respondent have submitted their proposed findings and conclusions and this Order issues from the proposed findings and conclusions, the hearing, all submitted petitions, the voluminous records of this case, and the record in the underlying conspiracy conviction.

II. FINDINGS AND CONCLUSIONS

Petitioner's petitions and Losh checklist assert ten (10) grounds for relief. The Court

will address each of these grounds as well as the doctrine of cumulative error which became apparent during the omnibus hearing and the review of the record and provides the basis for the relief granted to Petitioner. Upon a review of the omnibus hearing and the record of this case, the Court finds that there is clear and convincing evidence that the cumulative errors discussed below combined to deny Petitioner his right to a fair and impartial trial under the West Virginia Constitution and the United States Constitution.

A. Issues presented in Petitioner's petitions and Losh checklist.

- (1) Whether the State is barred by the principles of double jeopardy from sentencing Petitioner to consecutive life sentences pursuant to W.Va. Code §61-11-18 upon Petitioner's 1989 conspiracy conviction?
- (2) Whether Petitioner was denied his Sixth Amendment right to confront witnesses against him when the trial judge refused to allow Petitioner to cross examine a witness concerning the witness' violations of prison regulations?
- (3) Whether Defendant's trial counsel was ineffective?
- (4) Whether there was insufficient evidence for a jury to convict the Defendant Petitioner on the conspiracy charge?
- (5) Whether the recidivist proceedings were improperly held in Cabell County rather than Marshall County?
- (6) Whether the State breached its 1992 plea agreement with Petitioner by using the plea in a subsequent recidivist action in 1985 following a conviction for burglary?
- (7) Whether the trial court erred in admitting a pre-autopsy photograph over Petitioner's relevance objection, and whether that error rises to a constitutional violation cognizable in a habeas corpus proceeding?
- (8) Whether the trial Court's Order directing Petitioner's witnesses to testify in prison garb and shackles and directing the prosecution's witnesses to appear in street clothes entitles Petitioner to relief in a habeas corpus proceeding?

- (9) Whether the State's disclosure of a co-conspirator's trial transcripts four (4) days prior to trial and the trial Court's refusal to grant a continuance constituted unfair surprise to the Defendant on a material issue and the disclosure hampered Petitioner's preparation and presentation of a defense?
- (10) Whether a combination of any of the nine (9) proceeding errors constitute cumulative error on a scale that denied Petitioner his constitutional right to a fair and impartial trial?

B. Issues (1) through (6) do not warrant relief in this habeas corpus proceeding.

(1) Petitioner's second life sentence does not offend double jeopardy principles and is barred by res judicata pursuant to the West Virginia Supreme Court of Appeals' decision in Gibson v. Legursky, 415 S.E.2d 457 (W.Va. 1992).

Petitioner's second life sentence for the conspiracy conviction does not offend double jeopardy. Petitioner's claim was fully and finally adjudicated upon Petitioner's original habeas corpus petition in Gibson v. Legursky, 415 S.E.2d 457 (W.Va. 1992). In that case, the Court held that double jeopardy principles are not offended merely because the State uses convictions from a prior recidivist proceeding to prove a second recidivist conviction.

(2) The trial court did not deny Petitioner his Sixth Amendment right to confront witnesses against him when the Court refused to allow Petitioner to cross examine a witness concerning the witness' violations of prison regulations.

At the conspiracy trial, Petitioner sought to impeach a witness (Jackson) with a non-criminal institutional violation the witness received for bleaching his hair. A violation of a

prison regulation does not constitute a crime. See Conley v. Dingess, 250 S.E.2d 136, 138 (W.Va. 1979), overruled on other grounds, State ex rel. Faircloth v. Catlett, 267 S.E.2d 736 (W.Va. 1980). The trial court's refusal to allow Petitioner to impeach the witness with the institutional violation violated neither the Sixth Amendment or West Virginia Rule of Evidence 609 allowing impeachment for "an element of deceit, untruthfulness or falsification bearing on the witness' propensity to testify truthfully."

(3) Petitioner's trial counsel was not ineffective.

Under the circumstances, Petitioner's trial counsel was as effective as possible. Petitioner has not and cannot prove that his trial counsel was ineffective. The West Virginia Supreme Court of Appeals set forth the standard for ineffective assistance of counsel in State v. Miller, 459 S.E.2d 114 (W.Va. 1995).

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.

St. Pt. 5, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

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.

Id. at Syl. Pt. 6.

As will be discussed below, Petitioner's trial counsel acted reasonably under the circumstances of this case. She objected to the pre-autopsy photographs, she requested a continuance when confronted with the co-conspirator's transcript, she objected to the Court's Order requiring defense witnesses to appear in prison garb and shackles. The Court cannot find any fault with counsel's performance that would rise above engaging in hindsight or second-guessing.

(4) There was legally sufficient evidence for a jury to convict the Petitioner on the conspiracy charge.

In State v. Guthrie, 461 S.E.2d 163, 173 (W.Va. 1995), the West Virginia Supreme Court of Appeals adopted the federal standard of review regarding the sufficiency of the evidence needed to uphold a conviction. The Court explained the standard of review governing evidentiary sufficiency challenges in criminal cases:

[A] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilty beyond a reasonable doubt. As we have cautioned before, appellate review is not a device for this Court to replace a jury's finding

with our own conclusion. On review, we will not weigh evidence or determine credibility. Credibility determinations are for a jury and not an appellate court. On appeal, we will not disturb a verdict in a criminal case unless we find that reasonable minds could not have reached the same conclusion. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Guthrie, 461 S.E.2d at 175-176.

In order to convict someone of the crime of conspiracy, "the State must demonstrate that the defendant agreed with at least one other person to commit an offense against the State and that one of the conspirators committed an overt act to effectuate the offense." State v. Stevens, 436 S.E.2d 312, 315 (W.Va. 1993). This Court is of the opinion that the State arguably sustained its burden under the letter of the law.

The Court finds that the mere fact that Petitioner evidently knew of the plot and stood in the location witnesses testified he was to stand at the time of the murder meets the State's burden. Under such a heavy burden, this Court cannot say that the record contains *no evidence* from which a jury could find guilt beyond a reasonable doubt; however, as will be discussed below, the cumulative error in this case caused the inferences to lean unconstitutionally in favor of the State.

(5) The recidivist proceedings were not improperly held in Cabell County rather than Marshall County.

Petitioner has all but abandoned this ground since setting it forth in his first amended petition. As such, this Court finds that there was no error in holding the recidivist

proceedings in Cabell County.

(6) The State did not breach its 1992 plea agreement with Petitioner by using the plea in a subsequent recidivist action in 1985 following a conviction for burglary.

Petitioner first raised this issue by motion on July 31, 2003, two years after the omnibus hearing. Because the issue merely requires the review of the plea bargain agreement, this Court will review the issue in order to fully and finally adjudicate all Petitioner's issues in this omnibus proceeding.

Petitioner alleges that his February 19, 1982, plea agreement prohibits the State from ever using the plea in a recidivist proceeding. The relevant portion of the plea agreement states: "The State of West Virginia will not prosecute on or request the Court to add any time to the sentence, based on the recidivist provisions of the West Virginia Code."

Petitioner's claim that the State breached this agreement by using the plea agreement in *future* recidivist actions is without merit. The plain language of the agreement contemplates that the State will not use the conviction to enhance the *current* sentence. The agreement simply does not bar the State from using the plea as evidence of conviction if Petitioner committed crimes in the future. Unfortunately, Petitioner was convicted of burglary in 1985, and the 1982 conviction was used to enhance the 1985 sentence. Pursuant to the language of the agreement, the State did not commit a breach.

C. Under the doctrine of cumulative error, issues (7) through (9) combined to deny Petitioner his constitutional right to a fair and impartial trial.

The fact is undisputed that the trial Court *ordered* Petitioner's witnesses to testify in prison garb and shackles and *ordered* the State's witnesses, who were also incarcerated, to appear in street clothes. And while this case dealt with a conspiracy to murder an inmate, there was no dispute that the inmate (Lehman) was actually dead. Regardless of this undisputed fact, the trial Court admitted a pre-autopsy photo of Lehman with a gaping stab wound in his face over a relevancy objection. Lastly, the record clearly shows that Petitioner was denied a continuance after the State produced the trial transcript of a co-conspirator four (4) days prior to trial. In combination with the scant verbal evidence of Petitioner's involvement in the conspiracy, these cumulative errors unconstitutionally tilted the evidence in favor of the State and denied Petitioner his right to a fair and impartial trial.

(1) The trial Court erred in admitting the pre-autopsy photograph because the photograph was not relevant and had not probative value.

The trial Court's ruling on the photograph clearly violated the axiomatic language of Rules 401, 402 and 403 of the West Virginia Rules of Evidence. In order to admit evidence, the evidence must be relevant, i.e., "having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." W.Va. R.E. 401. Rule 403 provides that "relevant evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice.”

In the conspiracy trial, the pre-autopsy photo of Lehman simply was not relevant because no one disputed the fact that Lehman had been murdered. The introduction of Lehman's death certificate would have sufficed to prove his death. The photograph simply served to prejudice the Petitioner as someone who *may* have been involved in a violent act. The photograph unfairly placed a heavy burden on Petitioner in the eyes of the jury.

(2) The trial Court's order directing Petitioner's witnesses to testify in prison garb and shackles and directing the prosecution's witnesses to appear in street clothes was patently unfair.

This Court is well-aware of the West Virginia Supreme Court of Appeals pronouncement that “[a] criminal defendant has no constitutional right to have his witnesses appear at trial without physical restraints or in civilian attire.” Syllabus point 3, State ex rel. McMannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979). Even though the Court has not made the issue a constitutional issue per se, the Court has noted that “[a]s we have stated with respect to the witness prison garb issue, there may be occasions when forcing the defendant's witnesses to testify in physical restraints may create sufficient prejudice that reversible error will occur. This type of trial error, as we have previously noted, is not reachable by a writ of habeas corpus.” McMannis, 254 S.E.2d at 811. Other jurisdictions have consistently echoed the exception to the rule:

The general rule for shackling witnesses is that a defendant has a right to have his witnesses appear free of shackles, except in special circumstances where there is evident danger of escape or harm to individuals in the courtroom The reason underlying the rule is the inherent prejudice to the

defendant since it is likely the jury will suspect the witness's credibility. The prejudice factor toward the defendant, although much less than the situation where the defendant is shackled, provides a valid point of comparison even though the shackled witness causes do not directly affect the presumption of innocence.

Kennedy v. Cardwell, 487. F.2d 101, 105 n. 5 (6th Cir. 1973).

While it has not direct bearing on this case, this Court notes that the West Virginia law on shackles and prison garb was revised in State v. Allah Jamaal W., 543 S.E.2d 282 (W.Va. 2000). In Jamaal W., the Court ruled that the defendant, upon motion, does have the right to have his witnesses appear in street clothes.

In the case at bar, the issue is not so much that Petitioner's witnesses had to appear in garb and chains, but rather that the State's witnesses, who were incarcerated, were *ordered* to appear in street clothes. In order to guarantee a fair trial, the trial Court could have ordered all the incarcerated witnesses to appear in garb and shackles or street clothes. The trial Court's order unfairly tilted the psychological credibility scale in favor of the State. Combined with the other errors, this ruling added to the weight of the building cumulative error.

(3) The State's disclosure of a co-conspirator's trial transcripts four (4) days prior to trial and the trial Court's refusal to grant a continuance constituted unfair surprise to the Defendant on a material issue and the disclosure hampered Petitioner's preparation and presentation of a defense.

The final building block in the cumulative error wall concerns the Court's unreasonable denial of a continuance after the late disclosure. "[N]on-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to

make the disclosure hampers the preparation and presentation of the Defendant's case." Syllabus Point 1, State v. Johnson, 371 S.E.2d 340 (W.Va. 1988).

The State's non-disclosure of a key co-conspirator's testimony and the trial Court's refusal to continue the trial to give Petitioner's counsel time to review the testimony and prepare a defense, severely hampered the defense and added to prejudice caused by the photograph, garb and shackles. Standing alone, this error might not sway this Court's opinion on cumulative error; however, when combined with the other two errors, this Court is of the opinion that the odds were never even as far as the Petitioner was concerned.

(4) The combination of the three (3) preceding errors constitute cumulative error on a scale that denied Petitioner his constitutional right to a fair and impartial trial.

Given the preceding error, this Court is of the opinion that Petitioner did not receive a constitutionally fair and impartial trial. Cumulative error occurs "[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." State v. Johnson, 557 S.E.2d 811, 820 (W.Va. 2001)(quoting Syllabus Point 5, State v. Smith, 193 S.E.2d 550 (W.Va. 1972).

Petitioner is not a model citizen. He has an extensive criminal record, which he cannot and does not deny. Regardless of whether the Court grants this petition, Petitioner will serve a life sentence in prison. It would be too easy to deny Petitioner's petition outright on the technicalities raised by the State, but as the Court reviews the record of the

underlying conspiracy conviction, it becomes all too clear that Petitioner's extensive criminal record may have caused the State and this Court to drop their guard, and fail to ensure that Petitioner received a fair trial. As discussed above, though the State's evidence of conspiracy was scarce, it was technically enough to sustain a conviction under our standard of review.

This case is not unlike the Wizard of Oz. It begins innocently enough, but evolves into artificial world controlled by a man behind the curtain. In this case, cumulative error plays the wizard behind the curtain. As mentioned above, the state prevails on its technical arguments for conviction, and the State is persuasive when it argues the prison garb and shackles, the late disclosure of transcripts, and the autopsy photographs, individually are not enough to award Petitioner the relief he requests. But these items culminated in fundamental unfairness at trial. Just like the Wizard who yells, "Pay no attention to that man behind the curtain," after the curtain collapses revealing the charade, the State urges this Court to "pay no attention to the egregious errors" that denied Petitioner a constitutionally fair trial. If this Court adopts the State's argument and disregard's its duties to the Lady of Justice, "She's not only merely dead / She's really most sincerely dead." The Court will, therefore, grant Petitioner relief.

III. RULING

For the reasons set forth in the foregoing opinion, this Court ORDERS:

1. The Writ of Habeas Corpus and *ad subjiciendum* sought by Petitioner is hereby GRANTED;

2. Petitioner's January 19, 1989, conviction and sentence for conspiracy are hereby set aside;

3. This is a Final Order. The Circuit Clerk shall distribute certified copies of this Opinion Order to counsel of record, at the addresses below, and shall remove this action from the docket.

R. Lee Booten, II, Esq.
637 Seventh Street
Huntington, WV 25701

Allen H. Loughry, II, Esq.
Senior Assistant Attorney General
Office of the Attorney General
State Capitol, Room E-26
Charleston, WV 25305

4. The Circuit Clerk shall send a certified copy of this Order, Petitioner's amended petitions, and Petitioner's Losh checklist to the Office of the Clerk of the West Virginia Supreme Court of Appeals for entry in-a central file of post-conviction habeas corpus petitions at the following address:

Office of the Clerk
West Virginia Supreme Court of Appeals
State Capitol
East Wing, Room 317
Charleston, WV 25305

ENTERED this the 10th day of May, 2006.



DAVID M. PANCAKE, JUDGE

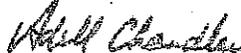
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STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON 5-10-06

GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS SEP 25 2008

 CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA