
NO. 34595

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

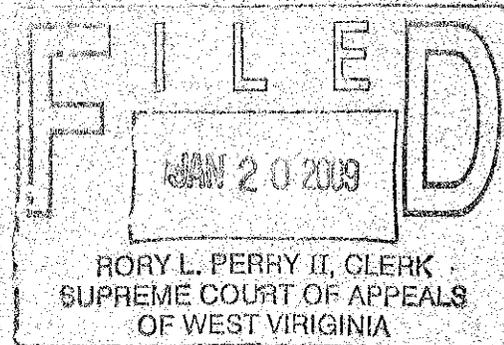
STATE OF WEST VIRGINIA *ex rel.*
WARREN DOUGLAS FRANKLIN,

Appellee,

v.

DAVID BALLARD, WARDEN,
Mount Olive Correctional Complex,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
State Bar No. 7370
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. STATEMENT OF THE FACTS	2
A. THE APPELLANT’S TRIAL	2
B. APPELLANT’S POST-CONVICTION PROCEEDINGS	4
III. STANDARD OF REVIEW	5
IV. ARGUMENT	6
A. THE APPELLANT FAILED TO PROVE THAT THE TESTIMONY ADDUCED BY THE STATE AT HIS TRIAL WAS PERJURIOUS	6
1. By Not Raising this Ground at Trial, the Appellant Waived It.	6
2. Appellant’s Proposed “Accomplice” Jury Instruction Did Not Fit the Facts	8
B. APPEALS ON THE MERITS ARE NOT CONSTITUTIONALLY MANDATED	9
C. APPELLANT’S ADMINISTRATIVE SEGREGATION IS NOT RELEVANT TO THE PROPORTIONALITY OF HIS SENTENCE	10
V. CONCLUSION	11

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Billotti v. Dodrill</i> , 183 W. Va. 48, 394 S.E.2d 32 (1990)	9
<i>Billotti v. Legursky</i> , 975 F.2d 113 (4th Cir. 1992)	9
<i>Bowman v. Leverette</i> , 169 W. Va. 589, 289 S.E.2d 435 (1982)	6
<i>Breed v. Jones</i> , 421 U.S. 519 (1975)	10
<i>Evans v. State</i> , No. 07-07-0377-CR, 2009 WL 57036 (Tex. Ct. Crim. App. 2009)	7
<i>In the Matter of Renewed Investigation of the State Police Crime Laboratory</i> , 219 W. Va. 408, 633 S.E.2d 762 (2006)	4
<i>Losh v. McKenzie</i> , 166 W. Va. 762, 277 S.E.2d 606 (1981)	4
<i>Marshall v. Longberger</i> , 459 U.S. 422 (1983)	5, 8
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959)	6
<i>Phillips v. Fox</i> , 193 W. Va. 657, 458 S.E.2d 327 (1995)	6
<i>Sandin v. Conner</i> , 515 U.S. 472 (1995)	11
<i>State ex. rel. McMannis v. Mohn</i> , 163 W. Va. 129, 254 S.E.2d 805 (1979)	5
<i>State v. Bailey</i> , 151 W. Va. 796, 155 S.E.2d 850 (1967)	5
<i>State v. Humphries</i> , 128 W. Va. 370, 36 S.E.2d 469 (1945)	8
<i>State v. Legg</i> , 151 W. Va. 401, 151 S.E.2d 215 (1966)	9
<i>Wirshing v. Colorado</i> , 360 F.3d 1191 (10th Cir. 2004)	10
STATUTES:	
W. Va. Code §§ 53-4A-1 <i>et seq.</i>	1, 2

W. Va. Code § 53-4A-1(a) 6

W. Va. Code §53-4A-1(d) 6

OTHER:

Cook, Russell S., *In Pursuit of Justice: The Right to Appeal a Life Sentence or
Its Equivalent in West Virginia*, West Virginia Lawyer (Oct. 2002) 9

W. Va. R. Civ. P. 41(b) 4

NO. 34595

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA *ex rel.*
WARREN DOUGLAS FRANKLIN,

Appellee,

v.

DAVID BALLARD, WARDEN,
Mount Olive Correctional Complex,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

Warren Douglas Franklin (hereafter Appellant) appeals the April 15, 2008, order from the Harrison County Circuit Court denying him post-conviction relief under West Virginia Code § 53-4A-1 *et seq.* (R.¹) Appellant's petition challenges his March 4, 1988, conviction on one count of first degree murder without a recommendation of mercy.

¹References to pages in the record of the trial proceedings below shall appear as "R. ____"; pages from the transcript of Appellant's trial on February 29, 1988 to March 4, 1988, will be cited as "Tr. ____." References to the habeas record, including transcripts of both evidentiary hearings, will be cited as "Hr ____."

Numerous pages contain two to three separate numbers, all citations cite to the page numbers located at the bottom center portion of the petition.

On August 21, 2006, Appellant filed a *pro se* petition for post-conviction relief with the Circuit Court of Harrison County under West Virginia Code §§ 53-4A-1 *et seq.* (Hr. 1-3.) Counsel submitted an amended petition on December 7, 2006. The court held evidentiary hearings on August 7, 2007, and January 4, 2008. By order entered April 15, 2008, the State habeas court denied relief. Appellant appeals this decision.

II.

STATEMENT OF THE FACTS

A. THE APPELLANT'S TRIAL.

On January 1, 1986, at approximately 5:30 p.m. prisoners housed at the West Virginia State Penitentiary in Moundsville, Marshall County, West Virginia, rioted. (Tr. 37-38, 375.) The riot lasted approximately 50 hours. (Tr. 209.) During this riot the Appellant, Bruce Franklin and William "Red" Snyder murdered fellow inmate Kent Slie. According to State Medical Examiner Dr. Irvin Sopher, Mr. Slie died from multiple stab wounds to the upper chest. (Tr. 258.)

The State presented the testimony of Donald Lane, a prisoner housed in general population. (Tr. 36.) Mr. Lane testified that he was in the New Walls section of the prison when he saw Doug and Bruce Franklin holding inmate Kent Slie while William "Red" Snyder punched Slie in the chest.² (Tr. 41, 42, 43.) After Snyder hit Slie, Lane observed blood all over Slie's chest. Lane did not see a weapon. (Tr. 43.) Lane further testified that he had previously heard Red threaten Slie's

²The New Walls unit was 1-3 units from the control unit at the time of the riot. (Tr. 80-81.)

life.³ (Tr. 44-45.) After seeing Snyder punch Slie, Lane left, spending the rest of the riot in the prison's dining room. (Tr. 45.)

The State next called former Moundsville inmate Wallace Jackson. (Tr. 97.) On January 1, 1986, Jackson was housed in the Control Unit along with the Appellant, Bruce Franklin and Red Snyder. (Tr. 101, 104.) After inmates had opened their doors, Appellant, Bruce Franklin and Red Snyder left the tier. (Tr. 108.) They returned to the control unit with Kent Slie. (Tr. 109.) When they first came in, Snyder had one hand on Slie's neck and another on his left arm. Bruce and Doug Franklin followed Snyder inside. (Tr. 109.) Upon entering the tier, they placed him in a cell. (Tr. 109.) Once inside the cell the Appellant, Bruce Franklin and Red Snyder repeatedly stabbed Slie with shanks. (Tr. 110.)

The State next called Correction Officer Bill Carter. (Tr. 175.) Although he was working at Huttonsville when the riot occurred, he was responsible for collecting evidence from C block after the riot. He recovered what appeared to be blood spots from the same cell Slie was pushed into by the Appellant, Bruce Franklin and Red Snyder. (Tr. 109, 169.) This blood was later identified as having the same blood characteristics as Mr. Slie's. (Tr. 319.)

In support of Appellant's alibi defense, the State called several inmates who testified that they saw Slie's dead body near the P&R hallway before the Appellant left the control unit. (Tr. 373, 404-05, 484-85.) On March 4, 1987, the jury convicted the Appellant of First Degree Murder. They did not recommend mercy.

³Snyder believed that Slie was an informant, and had ratted him out on other occasions. (Tr. 45.)

B. APPELLANT'S POST-CONVICTION PROCEEDINGS.

On May 18, 1994, the Appellant filed a petition for post-conviction relief directly with this Court. The Court issued a show cause order and remanded the case back to the State trial court for further review. By order entered December 1, 1995, the lower court dismissed the petition without prejudice because Appellant failed to prosecute it within one year. W. Va. R. Civ. P. 41(b). (Hr. 51.)

Appellant filed an amended petition for post-conviction relief on August 21, 2006. (Hr. 1-3.) Although the impetus for his petition was *In the Matter of Renewed Investigation of the State Police Crime Laboratory*, 219 W. Va. 408, 633 S.E.2d 762 (2006) ("Zain III"), Appellant subsequently abandoned his Zain claim. (Appellant's Brief at 2; Hr. 198.) Upon receipt of Appellant's petition the State habeas court appointed counsel who filed an amended petition, *Losh* checklist, and a memorandum of law on January 5, 2007. (Hr. 46-65.) The State habeas court convened an evidentiary hearing on August 7, 2007. (Hr. 90.) After reviewing Appellant's rights under Syl. pt. 1, *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), the court heard testimony from the Appellant. (Hr. 101-07, 108-66.)

The State habeas court reconvened Appellant's hearing on January 4, 2008. (Hr. 283.) The Appellant called fellow inmate Gary Gibson. (Hr. 296.) Mr. Gibson testified that he was in the dining room when the riot started. At some point he ran into Snyder and accompanied him to the New Walls section of the jail. Once Snyder found Slie, he walked him back to the first cell in lockup where he stabbed him. (Hr. 298.) Gibson testified that he did not see the Appellant walking with Snyder, nor was the Appellant present when Snyder killed Slie. (Hr. 298-99.) When asked why he

had waited 20 years before coming forward, Gibson said he was afraid of Snyder. Snyder had died 10 years before this hearing. (Hr. 310.)

The Appellant next called inmate Charles Peacher. (Hr. 317.) He also testified that the Appellant played no role in Slie's death. (Hr. 321.) He saw Snyder stab Slie with a foot-long, brass sink rod "run down through his neck." (Hr. 320, 328.) Earlier Gibson had testified that Snyder stabbed Slie with a knife he kept in his waistband. (Hr. 304.)

The State habeas court rejected Appellant's petition by order entered April 15, 2008. (Hr. at 364-78.)

III.

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 the credibility of witnesses whose demeanor has been observed by the jury in the first instance. *Marshall v. Longberger*, 459 U.S. 422, 434-35 (1983) ("fairly supported by the record" standard in federal habeas does not authorize a broader review of state court credibility determinations than are authorized in direct appeals within the federal system); Syl. pt. 2 *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967) ("The jury is the trier of facts and in performing that duty is the sole judge as to the weight of the evidence and the credibility of the witnesses.").

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. Questions of law are subject to *de novo* review. *Phillips v. Fox*, 193 W. Va. 657, 661, 458 S.E.2d 327, 331 (1995).

IV.

ARGUMENT

A. THE APPELLANT FAILED TO PROVE THAT THE TESTIMONY ADDUCED BY THE STATE AT HIS TRIAL WAS PERJURIOUS.

1. By Not Raising this Ground at Trial, the Appellant Waived It.

The Appellant first claims that his conviction was supported by testimony the State knew, or had reason to know, was perjurious. At trial defense counsel did not move to strike any witnesses' testimony, raise a general objection to the State's witnesses, or move for a mistrial. Instead, Appellant chose to assert this claim for the first time in his post-conviction petition.

Under West Virginia Code § 53-4A-1(a) the Appellant waived this assignment of error, unless he can fit it into a narrow statutory exception. Under West Virginia Code §53-4A-1(d) an assignment of error raising a "procedural or substantive standard not theretofore recognized" may be raised for the first time in a State habeas proceeding if such standard is intended to be applied retroactively. *Bowman v. Leverette*, 169 W. Va. 589, 591, 289 S.E.2d 435, 437 (1982). The Appellant has not satisfied the test. The Supreme Court first spoke on this issue in 1959, holding that convictions obtained by perjurious testimony, known to be perjurious by the government, violate due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Even if this Court were to decide that the Appellant properly preserved this issue below, the outcome would be no different. Appellant offers nothing but conclusory statements in support of his position. The Appellant testified that "in his

opinion” the State knowingly adduced perjurious testimony. (Hr. 115.) He cites to inconsistencies in the testimony of State witnesses Donald Lane and Wallace Jackson. (Hr. 116, 151-53.)

There is no evidence of perjury either in the trial court record or the habeas record. The State will concede that two of its witnesses testified inconsistently, but that, standing alone, does not establish perjury. The Texas Court of Criminal Appeals best explained the difference between perjury and inconsistency in *Evans v. State*, No. 07-07-0377-CR, 2009 WL 57036, at *1 (Tex. Ct. Crim. App. 2009):

A charge of perjury is a serious accusation that must be clearly supported by the evidence. *Haywood v. State*, 507 S.W.2d 756, 760 (Tex. Crim. App. 1974). While it is clear that the State may not obtain a conviction through the knowing use of perjured testimony, Appellant bears the burden of showing that the testimony used by the State was in fact perjured. *Losada v. State*, 721 S.W.2d 305, 311 (Tex. Crim. App. 1986). Perjury requires, in part, that a person make a false statement under oath with intent to deceive and with knowledge of the statement’s meaning. Tex. Penal Code Ann. § 37.02(a)(1) (Vernon 2003). Here, the alleged perjury is the discrepancy between Tripplehorn’s two prior statements and her trial testimony. Appellant has not shown an intent to deceive rather than being a mere misjudgment of the sequence of events or an otherwise innocent misstatement due to the traumatization of the witness at the time the statement was made.”

Appellant did present the testimony of Gary Gibson and Gary Peacher at his evidentiary hearing. Both Gibson and Peacher testified that the Appellant had nothing to do with Slie’s murder.

The habeas court ruled:

The Court finds that the Petitioner merely made conclusory statements that the State used perjured testimony to obtain his conviction. The Petitioner provided no details to support his allegation, except that the corrections officers knew that he did not commit murder.

Furthermore, the Petitioner gave no indication of which corrections officer he was making such allegations against, how he know can prove that they were lying or whether the Prosecuting Attorney knew they were lying.

(Hr. 372-73.)

Appellant's claim rises and falls on credibility determinations from his original trial, and his evidentiary hearing. Simply put, neither the jury or the State habeas judge were convinced by Appellant's evidence. A habeas appeal does not authorize this Court to redetermine the credibility of witnesses whose demeanor has been observed by the jury in the first instance. *Marshall v. Longberger*, 459 U.S. at 434-35 ("fairly supported by the record" standard in federal habeas does not authorize a broader review of state court credibility determinations than are authorized in direct appeals within the federal system).

2. **Appellant's Proposed "Accomplice" Jury Instruction Did Not Fit the Facts.**

Appellant next claims that the trial court failed to properly instruct the jury on the issue of accomplice testimony. Neither Red Snyder nor the Appellant's brother testified at trial. The Appellant never suggested a jury instruction telling them that they should review accomplice testimony with caution. (R. 121-31, 133-42, 147-49; Syl. pt. 2, *State v. Humphries*, 128 W. Va. 370, 36 S.E.2d 469 (1945)). Indeed, he mounted an alibi defense. (R. 130-31.)

State's Instruction 8 reads:

A general indictment as a principle in the first degree shall be sufficient to sustain a conviction regardless of whether the evidence demonstrates that the defendant was a principal, aider & abettor or accessory before the fact.

(R. 133.)

The trial court refused to give the instruction because it was incomplete as to aider and abettor. (*Id.*) The trial court gave defendant's "mere presence" instruction (R. 142), and State's Instruction 10, setting forth the elements of aiding and abetting. (R. 143.) State's Instruction 9 states, in part, "[W]here an offense is actually committed by one person, but another person is

present and knowing the unlawful intent aids by acts and encourages by words or gesture the one actually engaged in the commission of the act such person . . . is a principal offender and may be prosecuted and convicted of such.” (R. 144.) The Appellant did not object to these instructions. These instructions were given to ensure that, even if the jury found that Snyder actually stabbed Slie, if they found that the Appellant participated in the crime with intent he as guilty as Snyder. (Tr. 654-55.)

B. APPEALS ON THE MERITS ARE NOT CONSTITUTIONALLY MANDATED.

Appellant next claims that this Court’s decisions not to grant oral argument, and to summarily dismiss his petition for direct appeal denied him due process of law. This matter has been thoroughly reviewed by this Court in several previous cases. The Appellant offers nothing new to the mix.

A defendant in West Virginia has the right to apply for appellate review. He does not have the right to that review as a matter of course. *State v. Legg*, 151 W. Va. 401, 151 S.E.2d 215 (1966). In *Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990), this Court affirmed the propriety of discretionary review of sentences of life without mercy. West Virginia’s discretionary appellate review was found to comport with the federal due process clause in *Billotti v. Legursky*, 975 F.2d 113, 115 (4th Cir. 1992). This Court has issued several other orders upholding discretionary review of convictions. See Russell S. Cook, *In Pursuit of Justice: The Right to Appeal a Life Sentence or Its Equivalent in West Virginia*, West Virginia Lawyer, 18, 20 (Oct. 2002) and cases cited therein.

C. APPELLANT'S ADMINISTRATIVE SEGREGATION IS NOT RELEVANT TO THE PROPORTIONALITY OF HIS SENTENCE.

Appellant next claims that his sentence was disproportionate to the crime. This Court need not spend much time on this assignment of error. First Degree Murder carries a term of life imprisonment. The jury may recommend mercy, but are not required to.

The Appellant argues that the prison's decision to place him in administrative segregation violated his rights under the double jeopardy and due process clauses.

The double jeopardy clause applies to criminal prosecutions. *Breed v. Jones*, 421 U.S. 519, 528 (1975). Placing the Appellant in administrative segregation was not part and parcel of the criminal proceeding under review. It was, as the Appellant concedes, a separate administrative proceeding. *Wirshing v. Colorado*, 360 F.3d 1191, 1205 (10th Cir. 2004) ("it is well established that prison disciplinary sanctions - such as administrative segregation - do not implicate double jeopardy protections."). The Appellant also concedes that the placement was for his own protection. (Appellant's Brief at 21.)

Appellant also argues that he has a protected liberty interest in good time credit, which was taken from him in violation of the state and federal due process clauses. Conversely, he claims he has a liberty interest in freedom from assignment to administrative segregation.

The Supreme Court has recognized two situations in which a prisoner can be deprived of liberty such that due process protection is required: (1) there is a change in the prisoner's condition of confinement so severe that it essentially exceeds the sentence imposed by the court; and (2) the State has consistently given a benefit to prisoners, usually through a statute or administrative policy, and the deprivation of that benefit atypical and significant hardship on the inmate in relation to the

ordinary incidents of prison life. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). The record does not suggest such a hardship, nor does the Appellant attempt to prove this. The only evidence offered is the decision itself. Clearly, this is not a sufficient showing.

V.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Harrison County should be affirmed by this Honorable Court.

Respectfully submitted,

DAVID BALLARD, Warden,
Mount Olive Correctional Complex,
Appellee,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

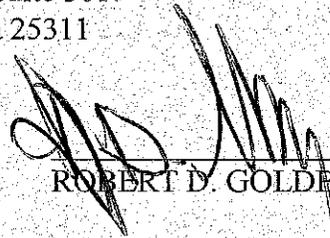


ROBERT D. GOLDBERG, State Bar No. 7370
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 10th day of January, 2009, addressed as follows:

To: Jack Hickok, Esq.
Public Defender Services
One Players Club Drive, Suite 301
Charleston, West Virginia 25311



ROBERT D. GOLDBERG