January 27, 2009 Jefferson County

E Black

FILE COPY

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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JEFFERSON COUNTY
CIRCUIT COURT

STATE OF WEST VIRGINIA ex rel.
VERNON DUNLAP,

Petitioner,

vs. Case No. 06-C-257

SW:

Please cc Mr. Black + Mr. Crofford to advise that Order has been entered

THOMAS L. McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL CENTER,

Respondent.

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JEFFERSON COUNTY
CIRCUIT COURT

ORDER DENYING PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS

This matter came before the Court this 1st day of October, 2008, upon the papers, pleadings, and Orders formerly had and read herein; upon Petitioner having filed a *pro se* Petitioner under W.Va Code § 53-4A-1 for Writ of Habeas Corpus on July 20, 2006; upon Petitioner having later filed an Amended Petition for Writ of Habeas Corpus on May 1, 2007; upon the Court having set this matter for an omnibus habeas corpus evidentiary hearing on April 3, 2008; upon the appearance of the Petitioner, in person and by, Eric S Black, Esq.; upon the appearance of the Respondent, by and through Laurence R. Crofford, Esq., Jefferson County Assistant Prosecuting Attorney.

WHEREUPON, the Court notes it has reviewed and considered the Petition and Amended Petition, the briefs and memoranda filed by the parties, the testimony presented at the evidentiary hearing, and the arguments of counsel. Furthermore, the Court notes it has reviewed the record of the case and reviewed all pertinent case law and legal authorities. Based upon the same, the Court deems the matter mature for decision and makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW pursuant to West Virginia Code § 53-4A-1, et seq.:

1. Petitioner Vernon Dunlap was indicted by the Jefferson County Grand Jury in 2004 for the offense o first degree murder in the death of Jennifer Leigh Dodson on February 19, 2004.

2. Ms. Dodson was found dead, face down on the floor of her apartment at 308 New Oak Tree Court, Charles Town, Jefferson County, West Virginia, that morning. Ms. Dodson's throat had been slashed and she had died from massive blood loss. Crystal Dodson, the victim's sister, Kenny Robinson, and Jamie Sisk discovered the body. Two children, Jennifer's daughter and Jamie's son, were found unharmed on the premises

3. A short time earlier, the Petitioner, Vernon Dunlap, Sr., was found in his pickup truck, slumped over the wheel unconscious in an apparent suicide attempt at the Shepherdstown, West Virginia, boat ramp and was transported by ambulance to City Hospital, Martinsburg, West Virginia for treatment.

4. Deputy Michael Dumer of the Jefferson County Sheriff's Office, among other items, found two kitchen type knives in the cab of the truck and, not recognizing any importance, threw them into the truck bed. Later, when it became known that Petitioner was a suspect in Ms. Dodson's murder, Deputy Dumer secured the knives and the truck itself.

5. Petitioner was hospitalized for several days under police guard at City Hospital While there he confessed killing Jennifer Dodson to his daughter, Tabitha Sanders.

6. Later, while in custody at the Eastern Regional Jail, Petitioner admitted the crime to two of his friends, Danielle and Troy Kellican. Also, during his incarceration at the regional jail before trial, he confessed to another inmate, Scott Marshall.

7. The Public Defender's Office initially represented the Petitioner, but had to withdraw due to a conflict of interest. Aaron Amore and his partner, James Kratovil, were appointed next to represent Mr. Dunlap, but had to withdraw also because of a conflict of interest when they learned that a former client, Jamie Sisk, would be a witness for the State.

8. Attorneys Amore and Kratovil were later admonished by the State Bar for not withdrawing when they learned that their client, Scott Marshall, was going to testify for the State that Petitioner had confessed to him.

<u>Ground 1: Did Trial Counsel's Failure to Conduct Independent Forensic Testing on various items of physical evidence constitute ineffective assistance of counsel?</u>

Supplemental Findings of Fact Pertinent to this Ground. The State offered no physical evidence at trial and

stipulated with the Defense that there was none; however, as part of the investigation, the police had gathered several items, including two knives, a bloody shoe print from the victim's apartment, a bloody hand print from carpeting in the victim's apartment. The Defense did not seek any testing of these or other items, although defense counsel was aware of the same.

Court's Ruling and Rationale: The Court does not find ineffective assistance of counsel in this fact situation Trial counsel testified..."Well, first of all as to the knives–well, I'll just go through that. We weren't sure if there was blood on them to begin with. They weren't in evidence. I could really argue that the state, you know, dropped the ball. There's someone else involved. I was afraid of –one of the fears is you have them tested you find your defendant's DNA on them, or you find a link to the defendant and there was no link whatsoever. And our strategy was that there was no forensic evidence whatsoever to link Vernon Dunlap to this killing. I really didn't want to go out and try to manufacture any." So, in the Court's opinion, there was a sound strategic reason not to pursue testing of these items. Furthermore, even if there was a deficient performance here under an objective standard of reasonableness, there is absolutely no evidence of any reasonable probability that, but for such performance, the result of the trial would have been different. Ground 1 is ORDERED denied.

Ground 2: Did Trial Counsel fail to sufficiently prepare Petitioner's case to the extent that such constituted ineffective assistance of counsel?

Supplemental Findings of Fact Pertinent to this Ground: Trial Counsel did not hire an investigator to track down Steve Fogle and confirm that the Investigating Officer had properly excluded Fogle as being a possible perpetrator of the murder. Deputy Dumer had discovered that Fogle was living in North Carolina and had received records from a Salvation Army Center indicating that Fogle had signed into that center in the day prior to and the day after the murder. It appears that trial counsel did vigorously cross examine Deputy Dumer on the officer's acceptance of these records as conclusively excluding Fogle as a possible perpetrator. Trial Counsel did not pursue for impeachment or any other purpose a letter purportedly from Scott Marshall to the Petitioner and another letter from a Brian Walls while they were all incarcerated at the Eastern Regional Jail. Scott Marshall testified at trial that Petitioner had confessed the crime to him. Three other witnesses also testified at trial that Petitioner had confessed

the crime to them. The Marshall letter read "Hey, Dunlap, this is Shotgun. I'm back here with Brian Walls. He said someone told you that I was going to testify against you. You don't ever have to worry about that because I don't even know anything about you. Someone is just trying to start some rumors. Your friend, Shotgun " Trial Counsel also did not attempt to interview Brian Wells or a Kerry Wells in connection with this issue. At the habeas evidentiary hearing, trial counsel testified that he basically dismissed the Marshall letter because jailhouse "snitches" do not wish to be identified as such before trial.

Court's Ruling and Rationale: With regard to the Fogle issue, it seems that the strategy here was "to leave the door of reasonable doubt open and suggest the police investigation of the death was inadequate." That is not an unreasonable strategy to take given the lack of physical evidence, the circumstantial nature of the State's case, and the theory of the defense. Accordingly, the Court does not find deficient performance under an objective standard of reasonableness. Further, even if the Court could find deficient performance here, there is absolutely no evidence of any reasonable probability that, but for such performance, the result of the trial would have been different. With regard to the issue pertaining to the Scott Marshall letter and the Wells', the Court is concerned that trial counsel did not confront Marshall with the same for impeachment purposes, although the Court concedes that trial counsel had done a pretty good job of impeaching Marshall by exploring his own crime and possible hopes of leniency if he cooperated with the State. Nevertheless, even if the Court considers this to be deficient performance, there is absolutely no evidence of any reasonable probability that, but for such performance, the result of the trial would have been different, especially since three other witnesses testified that Petitioner had confessed the crime to them. Ground 2 is ORDERED denied.

<u>Ground 3: Did Counsel's Failure to Move the Court for a Change of Venue, or to Obtain a Community Sentiment Survey constitute ineffective assistance of counsel?</u>

Supplemental Findings of Fact Pertinent to this Ground: Trial Counsel did not move the Court for a Change of Venue, nor did he conduct a Community Sentiment Survey to explore the issue. While this case, due to its nature, received media coverage, the trial did not occur until over 1 year after the murder. Extensive voir dire of the jury was conducted and a trial jury was impaneled.

Court's Ruling and Rationale: This ground appears to be founded in pure speculation. The ultimate test is whether or not a fair and impartial jury can be empaneled. A review of the transcript indicates that there was no particular difficulty in this case in putting together venire panels of regular and alternate jurors. There is no claim that trial counsel for the State and Defense were impeded in their voir dire inquiry. Ground 3 is ORDERED denied.

Ground 4: Did Trial Counsel fail to sufficiently meet with Petitioner and prepare his case for trial?

Supplemental Findings of Fact Pertinent to this Ground: The only evidence pertaining to this ground was elicited from Trial Counsel. Craig Manford testified that he had approximately a dozen phone conferences with Petitioner; that he met with Petitioner in person at least a dozen times; that Petitioner seemed to understand and approve of the trial strategy; and that Mr. Manford perceived that he had a pretty good working relationship with Petitioner.

Court's Ruling and Rationale: This Court cannot find a factual basis to support this ground. Ground 4 is ORDERED denied.

Ground 5: Did the Trial Court commit constitutional error in granting the State's motion to bifurcate the "guilt phase" from the "penalty phase?"

Supplemental Findings of Fact Pertinent to this Ground: In this case, Petitioner did not seek bifurcation of the guilt and penalty phases of the trial. At the pre-trial hearing on March 31, 2005, the Court conducted a *McGinnis* hearing on the State's notice of intent to use Rule 404(b) testimony from the Petitioner's ex-wife, Betty Yates, of the Petitioner's attempt to slash her throat and stabbing for which he served 2 ½ years in prison. The Court ruled the evidence admissible under the State's theory that it was admissible under Rule 404(b) as showing modus operandi. Near the end of the State's case-in-chief at trial, the State requested a sidebar conference at which it noticed the court and counsel that it was about to call Ms. Yates to the stand. The State also indicated that it desired to elicit further 404(b) evidence from Ms Yates that it had become aware of and that had not been noticed in the original 404(b) notice. No *McGinnis* hearing had been held relative to this additional evidence The trial court rejected the further proffered 404(b) evidence as being untimely offered. The State then moved to bifurcate the guilt and penalty phases with the idea of presenting the further evidence from Ms. Yates at the penalty phase should the Petitioner be convicted. The Defense objected and the Court denied the motion. During Ms Yates' testimony,

the State renewed its motion to bifurcate, the Defense objected, but this time the Court took the motion under advisement. After the Defense rested, the State called several rebuttal witnesses. Then the State again renewed its motion to bifurcate, the Defense objected and the Court again reserved ruling on the issue. The trial court ultimately granted the motion to bifurcate and, after the Court gave the Defense several days to prepare to adjust to the bifurcation, during the penalty phase, Ms. Yates testified to the acts that the State had previously tried to get in as 404(b) evidence, which evidence consisted of numerous acts of violence, jealous rage and intimidation committed by the Petitioner against her and their children Mr. Manford testified that the timing of the motion for bifurcation came as a surprise, but not the fact of the motion. Mr. Manford also testified that he felt that he was required to alter trial strategy in mid-stream because of the timing of the bifurcation.

Court's Ruling and Rationale: In West Virginia, both the State and the Defense may move for bifurcation in any case in which the jury is to consider the mercy issue The rule does not restrict when the motion can be made or whether it must be in writing. In State v. LaRock, 470 SE2d 613, our Court held that "a trial court has discretionary authority to bifurcate a trial and sentencing in any case where the jury is required to make a finding of mercy." Justice Cleckley, writing for the majority, explained, "Indeed, the ends of criminal justice would be defeated if mercy decisions were to be founded on a partial or speculative presentation of the facts." It appears that this was a discretionary call for the trial court, that the effort to bifurcate did not come as a surprise to the Defense, although the timing created some practical difficulties even though the Court recessed proceedings for several days. On balance, though, there is no evidence that would lead the undersigned to conclude that the bifurcation herein was constitutional error. The Court also notes that it had heretofore found this ground to be insufficient as per its Order herein of June 4, 2007, a copy of which is attached hereto. Ground 5 is ORDERED denied.

Ground 6: Did the Trial Court commit constitutional error in allowing Ms Yates' additional testimony during the penalty phase without first having conducted a *McGinnis* hearing or finding that such evidence was admissible under Rule 403?

Supplemental Findings of Fact Pertinent to this Ground: During the penalty phase of Petitioner's trial, Mrs Yates testified about numerous incidents, to-wit: that Petitioner choked her in front of the children, that Petitioner

dumped a drawer of knives in her lap and told the children that she would be dead before they got back, that Petitioner placed a telephone book on his son's head and lit it on fire, that he held his son over an electric stove with the burners on, that she saw Petitioner stab his brother in the leg with a knife, that Petitioner threatened to kill the children, and various other bad acts. This evidence came in without a *McGinnis* hearing having been conducted.

Court's Ruling and Rationale: This evidence was not 404(b) evidence in the context in which it was admitted Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person *in order to show that the person acted in a conforming manner in the case being tried.* This evidence was not heard during the "guilt phase," so it did not go to the question of guilt, but rather to the question of penalty. It was obviously relevant to the later question. The Court notes that it has already found this ground to be insufficient as per its Order herein of June 4, 2007, a copy of which is attached hereto. Ground 6 is ORDERED denied.

Ground 7: Were Petitioner's constitutional rights violated, and his trial proceedings compromised by a conflict of interest related to his initial court appointed attorneys?

Supplemental Findings of Fact Pertinent to this Ground: The law firm of Kratovil & Amore was appointed to represent Petitioner on or about April 8, 2004. That office also represented Scott Marshall in a different criminal matter. By and by, the State obtained a statement from Scott Marshall pertaining to Petitioner's alleged jailhouse confession to the murder of Ms. Dodson. Marshall subsequently testified as to this alleged confession at trial. Petitioner ultimately filed an ethics complaint with the West Virginia State Bar against Mr. Kratovil and Mr. Amore. The Disciplinary Board formally issued a public admonishment of Mr. Kratovil and Mr. Amore pursuant to Rule 1.10 of the West Virginia Rules of Professional Conduct. Petitioner suggests that he was prejudiced by this conflict of interest because sensitive information related to Petitioner's case may have been shared with Scott Marshall.

Court's Ruling and Rationale: There appears to be no evidence of the sharing of sensitive information, because none was presented by Petitioner at the evidentiary hearing Thus, the ground is not proven. Ground 7 is ORDERED denied.

The Court notes that all grounds not previously waived in the "Losh List" and not argued in Petitioner's Brief are ORDERED denied as waived. The Court notes that several grounds were rejected by the Court in its Initial Habeas Corpus Hearing Order of June 4, 2007, including, in part, the Petitioner's objections to the Prosecutor's comments in opening statements. The Court also notes that Petitioner had previously executed the Checklist of Grounds for Post-Conviction Habeas Corpus Relief, the "Losh List," a copy of which is attached hereto, and it is ORDERED that all grounds initialed thereon are deemed waived.

Upon consideration of all of which, the Court doth make the following conclusion of law. That the Petitioner is not entitled to relief upon his Amended Petition and the same ought to be dismissed.

ACCORDINGLY, it is ORDERED and ADJUDGED that Mr. Dunlap's Petition and Amended Petition are ORDERED dismissed with prejudice and the State is awarded costs.

It is further ORDERED that Mr. Black is appointed as counsel for Petitioner to seek an appeal of this Order to the West Virginia Supreme Court of Appeals, if such appeal is desired by Petitioner.

The Court notes the timely exception of all parties to any adverse rulings herein contained.

The Clerk shall enter the foregoing as and for the day and date first above written and forward attested copies hereof to all counsel of record and to the Clerk of the West Virginia Supreme Court of Appeals for inclusion in its master habeas corpus file

3cc
E. Black
L. Crofford, Asst P/A
WV Supreme Court of Appeals
10/2/08
DP

Circuit Judge

The Clerk is directed to retire this action from the active docket and place it among causes ended.

ATTEST:

PATRICIA A. NOLAND
CLERK OF COURT
JEFFERSON COUNTY, W.VA.

BY _____
DEPUTY CLERK