

item 112

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

MAX PAUL KITCHEN  
PETITIONER

vs

CIVIL ACTION 98-C-288

HOWARD PAINTER  
RESPONDENT

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ALVIS PORTER  
CIRCUIT CLERK  
LOGAN COUNTY

FINAL ORDER DENYING WRIT OF HABEAS CORPUS

By memorandum letter rendered by this Court on August 28, 2006, a copy of which will be recorded with the original order entered in the court file in this matter, [by the Honorable Judge Irene C. Berger, Judge of the Thirteenth Judicial Circuit, setting by special assignment for the Seventh Judicial Circuit (Logan County)], this Court reviewed a Supplemental Petition for Writ of Habeas Corpus Ad Subjiciendum, and Second Supplemental Petition for Writ of Habeas Corpus Ad Subjiciendum and Memoranda in Support of the Petitions, the Response and Supporting Memorandum by the Mingo County Prosecutor's Office [appointed to defend this petition on behalf of the Respondent,] and the trial transcript.

The Petitioner raised various claims of error:

- 1) Excessive use of uncharged misconduct and refusal to use the defense's limiting instruction for same;
- 2) Court's refusal to instruct the jury regarding its ability to infer malice;
- 3) Allegation of improper remarks in closing by prosecutor not objected to and allegation of leading questions;
- 4) Admission of baseball bat into evidence that was not the actual weapon used;
- 5) Allegation of false testimony;
- 6) Failure of court to disqualify two potential jurors;
- 7) Allowing testimony regarding co-defendant's guilty plea and refusal of limiting instruction by defense;
- 8) Ineffective assistance of counsel.

For reasons cited by this Court in the memorandum letter, the Court finds no constitutional error. The Court makes the following findings of fact:

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1) The Court finds that as to uncharged misconduct, the evidence was relevant and admissible on issue of motive and/or intent and premeditation and the Court gave an appropriate limiting instruction each time evidence of uncharged misconduct was raised. The Court further finds that over the course of two separate days, the trial court appropriately held an in camera hearing on this evidence prior to its admission. The Court finds no error on same.

2) The Court finds no constitutional error in the Court's instruction regarding malice since this instruction has specifically been approved by the WV Supreme Court of Appeals.

3) The Court finds no error in closing argument by prosecutor or in asking leading questions.

4) The Court finds that though a baseball bat was exhibited at trial that was not the one used in the crime, no constitutional error in its usage occurred since at least four trial witnesses testified that the bat was similar or substantially similar to the one used in commission of the crime.

5) The Court finds the allegation of false testimony raised is unsubstantiated and denies same.

6) The Court finds trial court's refusal to disqualify two jurors was proper since the respective relationships of the jurors as set forth do not exhibit "such prejudice or connection with the parties at trial that bias is presumed" in violation of the principles set forth in O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002).

7) The Court finds admission of evidence of co-defendant's guilty plea pursuant to his plea agreement was relevant on issue of co-defendant's credibility and was not unduly prejudicial. Further, the Court finds the trial court gave the jury a limiting instruction on the proper use of the evidence. No error can be found in refusing an instruction offered by defense counsel where the jury was properly instructed. The Court denies same.

The Court finds no cumulative constitutional error based on the claimed errors in the supplemental petition and denies same.

8) The Court finds no ineffective assistance of counsel as alleged in the supplemental petitions and denies same.

The Court in analyzing the claim for ineffective assistance of counsel reviewed the State ex rel. Daniel v. Legursky, 465 S.E.2d 416 (1995) two pronged test:

1) Was defense counsel's performance deficient under an objective standard of reasonableness?

2) Is there a reasonable probability that but for counsel's unprofessional error(s), the result of the proceedings would have been different?

The Court finds that the petitioner met the first prong of the analysis. The Court finds defense counsel's performance in failing to make a motion to bifurcate guilty and mercy stages of trial, failing to call character witnesses in mitigation, failing to argue for mercy, and failing to object to state's argument for no mercy was deficient under an objective standard of reasonableness since no reasonable explanation for the failures were tendered during the habeas proceedings.

The Court finds the petitioner has failed to meet the second prong of the analysis. The Court finds that there is not a reasonable probability that in the absence of these failures, the result of the trial would have been different.

The Court finds the following factors compelling in its ruling:

- 1) Six witnesses, including the petitioner and the co-defendant, testified to events leading to petitioner's conviction.
- 2) Petitioner and the co-defendant talked about whipping the victims before the incident happened.
- 3) The petitioner and co-defendant walked up the road and grabbed two baseball bats from their respective residences.
- 4) The co-defendant locked the gate across the road so the victims would have to use the four wheeler path. He and the petitioner hid on either side of the path and told the others to scatter or go up on the hill.
- 5) The petitioner and co-defendant committed an unprovoked attack. The co-defendant hit one victim with a bat and pulled him off the four wheeler. The petitioner struck the decedent (Andrew Caldwell) with the bat, and prior to being struck, the victim was down on his hands and knees saying, "Please don't hit me," "Don't hit me anymore," while being told by the petitioner to "Stay down," or "Lay down, lay down."
- 6) Witness Miller testified he could hear the victim "bubbling" in the water. Miller testified that petitioner "just stood there".
- 7) All of the participants were sober.
- 8) The medical examiner testified that the victim, Andrew Caldwell, died as a result of multiple, blunt force injury of the head with three impacts made by a blunt, heavy, elongated object.

The Court finds that given the testimony of all of the "eyewitnesses" in this case as to the harshness of the petitioner's conduct, the petitioner has failed to meet his burden of proving the reasonable probability of a different result under the second prong of Legursky, supra.

The Court further finds that the defense counsel's failure to give an opening statement [which is not evidence] does not violate an objective test of reasonableness.

The Court finds without merit the assertions that defense counsel at trial failed to develop a cogent, consistent defense and was ineffective in the cross-examination of the State's witnesses.

The Court finds that there was never any real evidence solicited that would support a self defense claim or show that this incident was anything other than an unprovoked attack by petitioner and the co-defendant.

The Court finds without merit petitioner's assertions that defense counsel was ineffective and failed to effectively represent him at appellate and other critical stages and failed to make rule specific objections to introduction of evidence or uncharged conduct and lacked knowledge of applicable case law.

The Court finds without merit petitioner's assertion of ineffectiveness at the appellate stage of the case concerning in camera hearing issues and adequately addressed these matters in earlier rulings.

The Court denies all other allegations raised in the petition and denies that any cumulative effect of failures resulted in ineffective assistance and prejudice to petitioner.

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For the foregoing reasons, the Court **DENIES** petitioner's Writ of Habeas Corpus in its entirety.

The Clerk shall forward a copy of this Order to each counsel and shall thereafter strike this matter from the docket of the Court.

DONE this 22<sup>nd</sup> day of August 2007

*Irene C. Berger*

CIRCUIT JUDGE OF LOGAN COUNTY

JUDGE IRENE C. BERGER

[SITTING BY SPECIAL ASSIGNMENT]

SUBMITTED FOR ENTRY:

*Jerry Lyall*  
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JERRY LYALL  
SPECIAL PROSECUTING ATTORNEY  
FOR LOGAN COUNTY

ALVIS PORTER  
CIRCUIT CLERK  
LOGAN COUNTY

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