

13-1200

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Ex rel. ROGER E. CLINE,
Petitioner,**

v.

Civil Action No. 06-C-152(O)

**WILLIAM M. FOX, WARDEN,
St. Mary's Correctional Center,
Respondent.**

ORDER

This action came on before the Court, Honorable J. C. Pomponio Jr., presiding upon Writ of Habeas Corpus by Roger E. Cline ("Petitioner"), by counsel, Matthew Victor, and Patrick I. Via, Prosecuting Attorney ("Respondent"), Upon Amended Petition for Writ of Habeas Corpus Ad-Subjiciendum. An omnibus hearing on the matter was held on October 3, 2013.

FINDINGS OF FACT:

1. The Petitioner filed his original pro-se petition with the Circuit Clerk of Greenbrier County on June 23, 2006.
2. The Petitioner was appointed counsel to represent him.
3. The Petitioner was found guilty of the felony offense of 1st Degree Murder on January 31, 1992 in Case Number 90-F-74.
4. The Petitioner was sentenced, by order entered February 14, 1992, to imprisonment in the Penitentiary of this State for the remainder of his natural life with a recommendation of mercy.
5. The Petitioner filed his first Petition for Writ of Habeas Corpus pro se, January 12, 1995, in Civil Case Number 95-C-34, the Petitioner was permitted to proceed *in forma pauperis* and appointed counsel, who filed a Petition for Writ of Habeas Corpus alleging the

following grounds:

- a. The court permitted the introduction into evidence against him his testimony in a prior trial.
 - b. Ineffective assistance of counsel.
 - c. Prosecutorial misconduct during summation.
 - d. The jury was not properly instructed.
6. The Petitioner filed a petition for appeal of his conviction to the West Virginia Supreme Court of Appeals which was refused on October 16, 1992.
 7. The Petitioner filed in Civil Action 95-C-34 was denied and dismissed on July 1, 1999. The Petitioner filed an appeal to the West Virginia Supreme Court of Appeals which was refused.
 8. The Petitioner then filed a Petition for Writ of Habeas Corpus June 23, 2006 in the Circuit Court of Kanawha County, West Virginia. The matter was transferred to Greenbrier County by order entered June 26, 2006.
 9. The Petitioner was granted *in forma pauperis* status and was appointed counsel by order entered December 3, 2007, and directed to file an amended petition if required.
 10. The Petitioner had filed a third Petition for Writ of Habeas Corpus in Civil Action 06-C-276, which was consolidated with this Civil Action by order entered December 5, 2007.
 11. The West Virginia Supreme Court of Appeals granted the Petitioner's *pro se* writ of mandamus Civil Case Number 06-C-276.
 12. A number of different attorneys were appointed to represent the Petitioner. His current counsel, Matthew A. Victor, filed an Amended Petition for Writ of Habeas Corpus on August 30, 2012.

13. The Petitioner filed a checklist of grounds for post-conviction habeas corpus relief wherein, after consulting with counsel, he marked each ground they considered inapplicable to the convictions challenged in the petition.
14. Petitioner was paroled to the State of Ohio on June 6, 2013.
15. Prior to the omnibus hearing held on October 3, 2013, Respondent submitted its Motion to Dismiss. Respondent subsequently submitted its November 4, 2013 Memorandum in Support of its Motion to Dismiss.

DISCUSSION OF LAW:

1. The Post-Conviction Habeas Corpus Act, W.Va. Code § 53-4A-1(a), states that:

Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief...
2. “If it appears to such court from said petition...that there is probable cause to believe that the petitioner may be entitled to some relief, and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall forthwith grant a writ...” W.Va. Code § 53-4A-3(a).
3. Further, West Virginia Code § 53-4A-3(b) provides that “Any writ granted in accordance with the provisions of this article be directed to the person under whose supervision the petitioner is incarcerated.”
4. In its *per curiam* opinion in Kemp v. State, the West Virginia Supreme Court of Appeals held that a petitioner’s request for habeas corpus ad subjiciendum had been rendered

moot by the circumstance of petitioner's release from the penitentiary one week prior to oral arguments upon his petition. *Kemp v. State*, 203 W.Va. 1, 2 (1997). In the footnotes to the opinion, the Court noted that the petitioner may be able to protect himself through a writ of error known as *coram nobis*. *Id.* at 2.

5. Similarly, in *Leeper-El v. Hoke*, Petitioner Leeper-El's petition for writ of habeas corpus was dismissed because he had been paroled from state custody. *Leeper-El v. Hoke*, 230 W.Va. 641, 741 S.E.2d 866, 867 (2013). The Court held that Leeper-El's petition was moot, as he had ". . . received the relief he sought in his habeas petition." *Id.* at 867.

CONCLUSIONS OF LAW

Adopting Respondent's argument, this Court is of the opinion that Petitioner's Amended Petition for Habeas Corpus, filed before this Court, must be dismissed as moot. Petitioner does not satisfy the statutory requirements of W.Va. Code § 53-4A-1(a), in that, as a parolee, he cannot be said to be ". . . seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief..." W.Va. Code § 53-4A-1(a). Following the Canons of Statutory Construction, the West Virginia legislature was sufficiently clear in extending post-conviction habeas corpus ad subjiciendum relief *only* to those petitioners "incarcerated under sentence of imprisonment." W.Va. Code §53-4A-1(a). As Respondent correctly asserts, the West Virginia legislature demarcated who had standing to seek the remedy of habeas corpus by limiting it to only those persons who were *incarcerated*.

Petitioner also fails to satisfy the statutory requirements of W.Va. Code § 53-4A-3(b) in that (1) his Petition is unripe, as it does not name the proper Respondent, given that Petitioner is no longer under the supervision of William Fox, the warden at St. Mary's Correctional Center; and (2) Petitioner is no longer incarcerated. Because Petitioner was released from incarceration and paroled to the State of Ohio, habeas corpus, as a remedy, is no longer available to him.

This Court also bases its decision on the precedence propounded in Kemp v. State and Leeper-El v. Hoke. As in Kemp, Petitioner's Petition for Habeas Corpus Ad Subjiciendum has been rendered moot by the circumstance of his release from the penitentiary prior to the omnibus hearing upon his Petition. Similar to the circumstances in Leeper-El, Petitioner's Petition is moot, as he had "... received the relief he sought in his habeas petition" upon his release from Respondent Warden William Fox's custody.

Petitioner's Petition has been rendered moot, as well as, unripe, by change in circumstance and his status as parolee. Consequently, his Petition no longer contains a legal controversy, and is hereby **DISMISSED**.

It is therefore, **ORDERED** that:

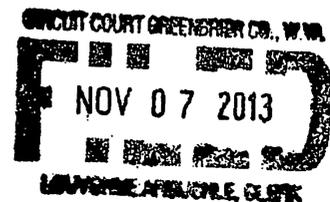
1. The petition for writ of habeas corpus is **DISMISSED** and stricken from the docket.

The Clerk is directed to forward a copy of this Order to the Petitioner, Roger E. Cline, and the office of the Prosecuting Attorney.

Entered this the 7th day of November, 2013.



J. C. Pomponio, Jr.
Circuit Court Judge



A True Copy:
ATTEST:



Lawrence Apfelcke
Clerk

By _____