STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Yasser Abdelhaq,
Petitioner Below, Petitioner,

vs.) No. 17-0078 (Ohio County 06-C-93)

Ralph Terry, Superintendent,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

FILED
November 21, 2018
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Yasser Abdelhaq, by counsel Kevin L. Neiswonger, appeals the Circuit Court of Ohio County's December 29, 2016, order denying his petition for writ of habeas corpus. Respondent Ralph Terry[1], Superintendent, Mt. Olive Correctional Complex, by counsel Gordon L. Mowen II, filed a response in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in denying habeas relief because he received ineffective assistance of counsel.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In January of 2000, petitioner was indicted on one count of first-degree murder for the stabbing death of Dana Tozar ("the victim"). Following an August of 2000 jury trial, petitioner was convicted of first-degree murder and sentenced to a term of incarceration of life, without mercy. Petitioner appealed his conviction, and this Court thereafter vacated the conviction and remanded the matter for a new trial. *See State v. Abdelhaq*, 214 W.Va. 269, 588 S.E.2d 647 (2003).

Thereafter, petitioner was indicted for a second time on one count of first-degree murder and was represented by attorneys Robert G. McCoid and John J. Pizzuti. During his bifurcated

[1]Effective July 1, 2018, the positions formerly designated as "wardens" are now designated "superintendents." *See* W.Va. Code § 15A-5-3. Moreover, petitioner originally listed David Ballard as respondent in this action. Mr. Ballard is no longer the superintendent at Mt. Olive Correctional Complex. Accordingly, the appropriate public officer has been substituted pursuant to Rule 41 of the West Virginia Rules of Appellate Procedure.

trial, petitioner's defense was that he could not have deliberately and intentionally killed the victim because he was in a psychotic state due to drug use. As such, petitioner sought a conviction on the lesser-included offense of second-degree murder. At the conclusion of his second jury trial, petitioner was again convicted of first-degree murder. Ultimately, the jury did not recommend mercy, and petitioner was sentenced to a term of incarceration of life, without mercy. Following this conviction, petitioner's second appeal to this Court was refused by order entered in May of 2005.

In 2006, petitioner initiated habeas corpus proceedings. Following a summary denial of his petition for writ of habeas corpus, this Court granted petitioner relief and ordered the matter remanded for the holding of an omnibus hearing on the limited issue of ineffective assistance of trial counsel.

In August of 2016, the circuit court held an omnibus hearing. During the hearing, Mr. McCoid testified extensively to the trial strategy and tactics employed, as well as to specific instances wherein he opted not to object to certain statements from the prosecution that petitioner alleged constituted prosecutorial misconduct. Mr. McCoid further testified unequivocally that petitioner understood "the full ramifications" of the trial strategy to admit guilt and ask for a conviction of second-degree murder and gave his consent. At several points during his testimony, Mr. McCoid addressed discussions the attorneys had with petitioner concerning the trial strategy, petitioner's understanding of the risks and benefits of such a strategy, and his consent to pursuing it. Having the benefit of seeing the State's theory of the case during the first trial, Mr. McCoid testified that they reevaluated the trial strategy since this "was not a case about whether [petitioner] had taken [the victim's] life," but was rather "about what his mental status was at the time that he did so." Mr. McCoid cited to portions of his opening statement in the case where he admitted that petitioner's guilt was not in question but urged the jury to convict him of second-degree murder due to the absence of premeditation. Based on the opening, Mr. McCoid indicated that

> [i]t is inconceivable that I would have given an opening statement in a first-degree murder case asking the jury to convict my client of second-degree murder without hav[ing] closely consulted with my client, discussed the minutia associated with that decision and obtained the full consent of my client in . . . advancing that defense.

Next, petitioner testified and admitted to killing the victim by stabbing her 235 times. He further agreed that he would have been "thrilled" with a verdict of life, with mercy, or second-degree murder. Petitioner testified that he did not agree with the strategy to ask for a conviction of second-degree murder, however. And while he was willing to take responsibility for the victim's murder, petitioner indicated the he "did not premediate" the act. Ultimately, by order entered on December 29, 2016, the circuit court denied petitioner habeas relief. It is from this order that petitioner appeals.

Our review of the circuit court's order denying petitioner's petition for a writ of habeas corpus is governed by the following standard:

> "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009).

On appeal, petitioner asserts three assignments of error, all of which involve allegations of ineffective assistance of trial counsel. First, petitioner argues that counsel failed to object to the following three instances of prosecutorial misconduct: (1) the prosecuting attorney's misstatement of the law concerning premeditation, wherein the prosecutor told the jury "don't forget the instructions. How long does it take to premeditate and deliberate? An instant"; (2) the prosecutor's personal opinion regarding the credibility of an expert witness; and (3) the prosecutor's inappropriate mention of mercy, including an instance wherein the prosecutor said that "[petitioner's] mercy is that he gets to live. People worked to save his life at that hospital. He gets to live, and [the victim] is dead." Second, petitioner argues that counsel was ineffective for failing to object to what he alleges was an improper jury instruction on the inference of malice and the intent to kill. Finally, petitioner alleges that counsel was ineffective for failing to obtain his consent to pursue a defense strategy of admitting culpability but challenging the requisite intent to support a first-degree murder conviction. However, our review of the record supports the circuit court's decision to deny petitioner's petition for writ of habeas corpus as to each of petitioner's assignments of error. Petitioner's arguments presented herein, with the exception of his assertion that the circuit court failed to substantively address his third assignment of error, were thoroughly addressed by the circuit court in its order denying petitioner habeas relief.

As to petitioner's third assignment of error asserting that his counsel was ineffective for pursuing a trial strategy to which he did not consent, we find no error. This Court has held that

> [i]n 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 (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.

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

> [i]n 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 6-7, 459 S.E.2d at 117-18, Syl. Pt. 6. Finally, "[w]here a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Here, we find that petitioner is entitled to no relief in regard to his third assignment of error, because he cannot show that no reasonably qualified defense attorney would have pursued the strategy that trial counsel did herein. Further, petitioner's argument in support of this assignment of error lacks any basis in the record. Aside from his unsupported claims that he never agreed to the strategy to admit culpability and seek a second-degree murder conviction, the evidence obtained at the omnibus hearing overwhelmingly establishes that petitioner's trial counsel advanced this strategy with petitioner's consent and support.

Specifically, Mr. McCoid testified that petitioner and trial counsel spoke about the trial strategy at length, even going so far as to author a letter together in advance of trial seeking a plea agreement to second-degree murder on the basis that petitioner admitted to killing the victim but without the intent necessary to be guilty of first-degree murder. While the record shows that counsel instructed petitioner to author this letter in the hope that it could be used to mitigate against a sentence of life, without mercy, in the event of a first-degree murder conviction, the fact remains that it is indicative of petitioner's agreement to pursue an overall strategy to obtain a conviction on a lesser-included offense or otherwise lessen the subsequent term of incarceration imposed. Further, counsel testified at length about the discussions he had with petitioner concerning the trial strategy, in addition to petitioner's understanding of that strategy, its attendant risks and benefits, and his ultimate consent to the strategy. As such, this issue was one of credibility for the circuit court to make. *See State v. Guthrie*, 194 W.Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995) ("An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact."). Given that the circuit court denied petitioner relief on this ground, it is clear that it did not find his testimony that he did not agree to this trial strategy to be credible. This is especially true in light of petitioner's testimony at the omnibus hearing that he would have been "thrilled" with a conviction of either second-degree murder or a sentence of life, with mercy. Given that petitioner specifically acknowledged his desire to be sentenced to something less that life, without mercy, it is clear that he supported trial counsel's strategy to obtain such a result. Accordingly, we find no error.

The circuit court's order includes well-reasoned findings and conclusions as to the assignments of error now raised on appeal. Because we find no clear error or abuse of discretion in the circuit court's order or record before us, we hereby adopt and incorporate the circuit court's findings and conclusions as they relate to petitioner's assignments of error raised on appeal and direct the Clerk to attach a copy of the circuit court's December 29, 2016, "Order" to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 21, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice Paul T. Farrell sitting by temporary assignment