

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Rosendo C.,
Petitioner Below, Petitioner**

vs) No. 16-0049 (Gilmer County 14-C-21)

**David Ballard, Warden,
Mount Olive Correctional Center,
Respondent Below, Respondent**

FILED
March 13, 2017
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Rosendo C., by counsel Kevin W. Hugart, appeals the Circuit Court of Gilmer County's December 28, 2015, order that denied his petition for writ of habeas corpus.¹ The State of West Virginia, 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 his request for habeas relief because (1) his trial counsel was constitutionally ineffective; (2) the underlying conviction was obtained through an involuntary guilty plea; (3) the prosecutor had a conflict of interest; and (4) the sentence imposed constituted cruel and unusual punishment.

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 order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

In November of 2007, a Gilmer County grand jury indicted petitioner on sixteen counts of sexual abuse by a parent, guardian, or custodian, in violation of West Virginia Code § 61-8D-5(a); sixteen counts of first-degree sexual abuse, in violation of West Virginia Code § 61-8B-7(a)(1); two counts of child abuse resulting in injury, in violation of West Virginia Code § 61-8D-3(b); and one count of wanton endangerment, in violation of West Virginia Code § 61-7-12. During the proceedings, petitioner's counsel requested that petitioner undergo a psychiatric evaluation and the circuit court granted said request. The report from that evaluation states that petitioner "had no mental disease or defect that would have prevented him from appreciating the

¹Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W.Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W.Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W.Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

wrongfulness of his acts, [or] would have prevented him from conforming his acts to the requirements of the law.” The evaluator stated that petitioner was competent to stand trial, had an “adequate appreciation of the proceedings against him,” and had the capacity to assist his attorney.

Ultimately, in March of 2008, petitioner pled guilty to five counts of sexual abuse by a parent, guardian, or custodian, in violation of West Virginia Code § 61-8D-5(a). In so doing, petitioner admitted to having sexual intercourse with his minor step-daughter. He was sentenced on the same day to terms of incarceration of not less than ten nor more than twenty years on each of the five counts of sexual abuse by a parent, guardian, or custodian; the sentences were ordered to run consecutively.

In September of 2008, after his conviction and sentencing, petitioner filed a direct appeal with this Court, and by order entered on December 9, 2008, this Court refused petitioner’s petition for appeal. This Court refused petitioner’s subsequent petition for rehearing.

In August of 2014, petitioner filed a petition for habeas corpus relief with the circuit court alleging (1) ineffective assistance of trial counsel; (2) that the underlying conviction was obtained through an involuntary guilty plea; (3) that the prosecutor had a conflict of interest; and (4) that the sentence imposed constituted cruel and unusual punishment. In October of 2015, the circuit court held an omnibus evidentiary hearing, wherein both petitioner and his defense counsel testified. Counsel testified that he met with petitioner approximately ten to fifteen times during the proceedings. Counsel also testified that he explained to petitioner that he had the right to a jury trial, the right to testify, the right to remain silent, the right to confront his accusers, and the right to call witnesses. Counsel further testified that he ultimately recommended that petitioner accept a plea given the indictment, petitioner’s admission that he and his wife wanted children and agreed that he would have sexual intercourse with his step-daughter to produce children, and the paternity test establishing that he was, in fact, the father of his step-daughter’s children. As to petitioner’s competency, counsel testified that petitioner appeared coherent during their meetings and the proceedings. Counsel noted that petitioner was incarcerated during the proceedings leading to his conclusion that petitioner was not under the influence of any illegal substances.

Petitioner testified that his counsel “never explained any of his constitutional rights” and that his counsel only met with him approximately three times. Petitioner also testified that he did not know “he was waiving so many rights” by entering a guilty plea, that his counsel appeared to be “working for the State,” and that his counsel showed no interest in defending him. Petitioner further testified that he felt that the circuit court “threw the book at him” and that he was “stoned” at both the plea and sentencing hearing so he did not understand the proceedings, making his plea involuntary. Following the omnibus evidentiary hearing, the circuit court entered an order on December 28, 2015, denying petitioner’s petition for writ of habeas corpus. This appeal followed.

This Court reviews a circuit court order denying habeas corpus relief under 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 argues that the circuit court erred in denying habeas relief based on his claim that his trial counsel was constitutionally ineffective, the underlying conviction was obtained through an involuntary guilty plea, the prosecutor had a conflict of interest, and the sentence imposed constituted cruel and unusual punishment. We do not agree. Our review of the record supports the circuit court’s decision to deny petitioner post-conviction habeas corpus relief based on the errors alleged in this appeal, which were also argued below. According to the record on appeal, petitioner’s own testimony established that he was not addicted to drugs, underwent a psychiatric evaluation to determine competency, and met with his counsel numerous times throughout the proceedings. Indeed, the circuit court’s order includes well-reasoned findings and conclusions as to the assignments of error raised on appeal. Given our conclusion that the circuit court’s order and the record before us reflect no clear error or abuse of discretion, we hereby adopt and incorporate the circuit court’s findings and conclusions as they relate to petitioner’s assignments of error raised herein and direct the Clerk to attach a copy of the circuit court’s December 28, 2015, “Final Order On Habeas Corpus Petition” to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 13, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Elizabeth D. Walker