

Notice: On April 7, 2017 the Court granted a petition for rehearing in this matter. This Memorandum Decision is therefore withdrawn and no longer effective.

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

**FILED
February 21, 2017**

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**Dennis Gale Hubbard,
Petitioner Below, Petitioner**

vs) **No. 16-0148** (Mercer County 12-C-320)

**Ralph Terry, Warden,
Stevens Correctional Center,
Respondent Below, Respondent**

MEMORANDUM DECISION

Petitioner Dennis Gale Hubbard, by counsel Paul R. Cassell, appeals the Circuit Court of Mercer County's January 20, 2016, order denying his amended petition for writ of habeas corpus. Respondent Ralph Terry,¹ Warden, by counsel Nic Dalton, filed a response. Petitioner filed a reply. On appeal, petitioner argues that the circuit court erred in denying his amended habeas petition on the grounds of ineffective assistance of counsel, a change in the law since the time of his conviction, the failure to preserve certain evidence, and cumulative error.

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 July of 2005, petitioner shot and killed Ricardo Edward Lee after Mr. Lee entered petitioner's residence. By his own admission, petitioner fired ten shots at Mr. Lee, emptying his firearm. During the February of 2006 term of court, petitioner was indicted on one count of first-degree murder. Petitioner's trial commenced in August of 2006. At trial, petitioner argued that he acted in self-defense and claimed that Mr. Lee was holding a knife at the time of the shooting. However, several witnesses testified that they did not see Mr. Lee holding a knife at the time of

¹Petitioner originally listed Marvin C. Plumley, Warden of Huttonsville Correctional Complex, as respondent in this matter. However, petitioner is no longer housed at Huttonsville Correctional Complex and is, instead, housed at Stevens Correctional Center. Pursuant to Rule 41(c) of the West Virginia Revised Rules of Appellate Procedure, the name of the correct public officer has been substituted as respondent in this action.

the shooting or see him move toward petitioner in a threatening manner. Ultimately, the jury convicted petitioner of one count of second-degree murder. Thereafter, petitioner filed a motion for a new trial, which the circuit court denied. By order entered in October of 2006, the circuit court sentenced petitioner to a term of incarceration of forty years. Petitioner thereafter appealed his conviction to this Court, and we refused the same by order entered in September of 2008.

Petitioner filed a petition for writ of habeas corpus in May of 2010. The circuit court appointed an attorney to represent petitioner and he later filed an amended petition. Ultimately, the circuit court denied that petition in May of 2010. Thereafter, petitioner filed a second petition that the circuit court denied in October of 2010.

In June of 2012, petitioner filed a third petition for writ of habeas corpus in the circuit court. After the circuit court appointed counsel in February of 2013, the State conceded that petitioner received ineffective assistance of counsel in his prior habeas proceeding. As such, the circuit court permitted petitioner to file an amended petition. In November of 2014, the circuit court held an omnibus evidentiary hearing. The circuit court then permitted evidentiary depositions of fact and expert witnesses. In June of 2015, the parties presented their final arguments to the circuit court. By order entered on January 20, 2016, the circuit court denied petitioner's amended petition. It is from that order that petitioner appeals.

This Court reviews appeals of circuit court orders 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 to this Court, petitioner argues that he was entitled to habeas relief due to trial counsel's ineffective representation, a favorable change in the law with retroactive effect, and cumulative error.² The Court, however, does not agree. Upon our review and consideration of the circuit court's order, the parties' arguments, and the record submitted on appeal, we find no error

²Petitioner also alleges error regarding a recording of a radio broadcast that he asserts was played to the jury during trial and subsequently lost. However, the Court finds that neither petitioner's amended petition for writ of habeas corpus nor his memorandum in support of the amended petition addressed this alleged error. “Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered.” *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999).” *Noble v. W.Va. Dep't of Motor Vehicles*, 223 W.Va. 818, 821, 679 S.E.2d 650, 653 (2009). Accordingly, the Court declines to address this assignment of error on appeal.

or abuse of discretion by the circuit court. Our review of the record supports the circuit court's decision to deny petitioner post-conviction habeas corpus relief based on these alleged errors, which were also argued below. 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 January 20, 2016, "Order" to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 21, 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