

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Michael Blickenstaff,
Plaintiff Below, Petitioner

vs.) **No. 20-0176** (Jefferson County 18-C-47)

Donnie Ames, Superintendent,
Mt. Olive Correctional Complex,
Defendant Below, Respondent

MEMORANDUM DECISION

Petitioner Michael Blickenstaff, by former counsel David P. Skillman, filed an appeal of the January 29, 2020, order of the Circuit Court of Jefferson County denying his petitions for a writ of habeas corpus and dismissing his case with prejudice. Respondent Donnie Ames, Superintendent, Mt. Olive Correctional Complex, by counsel Patrick Morrissey and Holly M. Flanigan, filed a response in support of the circuit court's order. By order entered on February 18, 2021, this Court determined that petitioner's brief was deficient and directed petitioner's newly-appointed counsel, Kirk H. Bottner, to file an amended petitioner's brief. The order further directed respondent to file an amended respondent's brief. Complying with the Court's directive, petitioner, by counsel Kirk H. Bottner, filed an amended petitioner's brief.¹ Respondent, by counsel Patrick Morrissey and William E. Longwell, filed a summary response.

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,

¹ We note that the following "Preface" was included in the amended petitioner's brief:

Rule 10 Disclosure: Undersigned counsel discussed with Appellant regarding the merits of Appellant's proposed appeal. During these discussions, counsel made it clear to Appellant that several of Appellant's grounds for appeal lacked merit, however, the Appellant insisted that an appeal be filed on his behalf. Thus, undersigned counsel, pursuant to Rule 10(a) of the West Virginia Rules of Appellate Procedure, filed a notice of appeal, and perfected the appeal on Appellant's behalf.

a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner's conviction arises from events occurring on August 25, 2014. On that day, he rode with Nicole M., his child's mother, to take the couple's child to daycare. During the trip, petitioner threatened Nicole M. with a knife and took over driving the vehicle. He drove for five hours with Nicole M. and the child through Maryland, West Virginia, and Virginia. During the drive, petitioner threatened to stab Nicole M., threatened to carve his initials into Nicole M.'s forehead, cut Nicole M.'s neck with the knife, and punched Nicole M.'s mouth, causing a tooth to break through her upper lip. Nicole M. did not physically resist petitioner when he took control of the vehicle or during the drive. At the conclusion of the five-hour drive, petitioner returned Nicole M. and the child to Nicole M.'s apartment in Maryland. Nicole M. reported the incident to law enforcement the following day, and petitioner was indicted in Maryland and West Virginia on crimes arising from the incident.

Petitioner was convicted of false imprisonment in Maryland and then extradited to West Virginia to stand trial on one count of kidnapping. Before his trial in West Virginia, petitioner filed a motion asking the West Virginia trial court to dismiss the case on the ground that he was illegally extradited to West Virginia. The trial court denied the motion.

During petitioner's trial on the kidnapping charge, the State presented testimony through an expert witness, Katherine Spriggs, a program manager at Shenandoah Women's Center, to explain why Nicole M. did not physically resist petitioner during the kidnapping. Ms. Spriggs testified that domestic violence victims' compliance with abusers is more often out of fear than consent to the abuse. Before trial, petitioner had filed a motion to exclude Ms. Spriggs's testimony on the ground that her testimony would be irrelevant and unduly prejudicial; however, he did not provide an explanation as to why her testimony would be irrelevant and unduly prejudicial, and the trial court denied the motion. Petitioner did not make any objection to Ms. Spriggs's testimony at trial, nor did he present testimony of an expert witness to rebut Ms. Spriggs's testimony.

At the conclusion of his trial, petitioner was convicted of kidnapping and sentenced to life in prison without mercy. Petitioner appealed his conviction to this Court. On appeal, petitioner argued that the trial court erred by permitting Ms. Spriggs's testimony and by admitting a prior conviction for second-degree assault against Nicole M. into evidence. The Court found no merit to either argument and affirmed petitioner's conviction. *See State v. Blickenstaff*, 239 W. Va. 627, 630, 804 S.E.2d 877, 880 (2017). Specifically, regarding Ms. Spriggs's testimony, the Court determined that petitioner's motion to exclude Ms. Spriggs's testimony was properly denied because it lacked sufficient specificity to "alert the trial court to the specific nature of his claimed defect." *Id.* at 631, 804 S.E.2d at 881. The Court went on to find that "Ms. Spriggs's testimony on Nicole M.'s state of mind during her kidnapping . . . is relevant to whether she consented to her kidnapping." *Id.* at 631 n.12, 804 S.E.2d at 881 n.12.

In March of 2018, petitioner filed a pro se petition for a post-conviction writ of habeas corpus ("pro se petition"). Therein, petitioner asserted multiple grounds for relief, including arguing that he was denied due process and effective assistance of counsel when his trial counsel failed to object to the testimony of Ms. Spriggs. The circuit court appointed counsel to petitioner

and directed counsel to file an amended petition and *Losh* list.²

In September of 2018, petitioner's appointed counsel filed the amended petition for writ of habeas corpus ("amended petition"). The amended petition included numerous grounds for relief, including the assertion that petitioner's trial counsel was ineffective by failing to (1) timely and properly object as to the relevancy and prejudice of Ms. Spriggs's testimony, (2) retain an expert witness to testify on petitioner's behalf and rebut the testimony of Ms. Spriggs, (3) properly and completely instruct the jury regarding petitioner's kidnapping charge, and (4) request or offer a jury instruction on lesser-included offenses. The amended petition also contended that petitioner's extradition from Maryland to West Virginia was flawed. The amended petition set forth petitioner's request for an evidentiary hearing.

Petitioner attached numerous documents to his amended petition, including a *Losh* list and several forms associated with the Interstate Agreement on Detainers ("IAD").³ The *Losh* list consisted of a five-page document. The first page of the document directed petitioner to "check each ground that [he] consider[ed] *inapplicable* to the conviction(s) challenged in the habeas corpus petition," and the document indicated that checked grounds "will be deemed to have been waived." The document also directed petitioner to "initial each ground waived just to the right of each ground which is checked." Thirty-three of the fifty-three grounds were checked; however, petitioner's initials do not appear anywhere in the document. The final page of the document contained sections titled "certificate of petitioner" and "certificate of counsel," and each of these sections was followed by a signature line. No signatures appear on any page of the five-page document.

In October of 2018, petitioner filed a pro se amended petition for writ of habeas corpus ("pro se amended petition"), asserting two additional grounds for habeas relief that were not included in the amended petition.

In March of 2019, the circuit court held a short hearing in the case. Petitioner was not present for the hearing, but his counsel appeared on his behalf. The circuit court indicated its intent to stay the case pending this Court's decision in *State v. Scruggs*,⁴ believing that *Scruggs* may be dispositive of an issue in the habeas proceeding.

A second hearing was held in December of 2019. During the hearing, the circuit court

² See *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981).

³ The Interstate Agreement on Detainers "is a compact among forty-eight states and the United States, the purpose of which is to effect the speedy disposition of outstanding criminal charges against prisoners incarcerated in other jurisdictions." *United States v. Stoner*, 799 F.2d 1253, 1255 (9th Cir. 1986). West Virginia is a member of the IAD. See W. Va. Code §§ 62-14-1 to -7.

⁴ *State v. Scruggs*, 242 W. Va. 499, 836 S.E.2d 466 (2019), was filed on November 21, 2019.

observed that the Court had issued its decision in *Scruggs*, and the circuit court told petitioner, “[T]he decision in the *Scruggs* case pretty much forecloses the bulk of your petition.” Petitioner’s counsel requested that the circuit court proceed to hold an evidentiary hearing, but the circuit court responded that an evidentiary hearing would be unnecessary. No mention was made during the hearing of the *Losh* list. The circuit court concluded the hearing by deciding that petitioner was not entitled to habeas relief. The court directed respondent’s counsel to prepare an order.

The circuit court entered an order on January 29, 2020, with its ruling on the pro se petition, the amended petition, and the pro se amended petition. The circuit court determined that an evidentiary hearing was unnecessary, it denied all habeas relief sought, and it dismissed the case with prejudice. In the order, the circuit court addressed issues raised in the three petitions, including whether petitioner’s trial counsel was ineffective, whether the State failed to bring petitioner to trial within one hundred and eighty days pursuant to the IAD, whether the State took custody of petitioner without first ensuring petitioner had waived extradition, whether petitioner was entitled to relief on any ground “specifically waived” in petitioner’s *Losh* list, and whether petitioner was entitled to relief on any other ground.

With regard to the issue concerning ineffective assistance of trial counsel, the circuit court found that “[p]etitioner’s assertions lack the specificity required for habeas relief to be granted.” The Court determined that, as to each of the four claims that petitioner’s trial counsel was ineffective, petitioner had failed to establish the necessary elements for relief as described in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Regarding petitioner’s claim that his trial counsel was ineffective by failing to timely and properly object to the testimony of Ms. Spriggs, the circuit court determined that petitioner failed to state, “with any particularity,” that his trial counsel’s representation was deficient under an objective standard of reasonableness or that the outcome of the trial would have been different had counsel lodged an objection. The circuit court observed that “[t]he thrust of [p]etitioner’s complaint regarding [Ms.] Springs appears to be its relevance in the jurors[’] understanding of the victim’s passive response to being kidnapped vs. a fight response.” The circuit court found that this issue was addressed by the Court on petitioner’s direct appeal and that the Court had decided Ms. Spriggs’s testimony was relevant.

As for petitioner’s argument that his trial counsel was ineffective by failing to offer expert witness testimony on petitioner’s behalf, the circuit court concluded the argument had no merit, stating, “Petitioner does not argue, explain or cite with any specificity, any opinion offered by Ms. Spriggs, with which another expert would have disagreed. Petitioner cannot and does not cite any literature, treatise or opinions which would contradict the opinions of Ms. Spriggs.”

On petitioner’s claim that his trial counsel was ineffective by failing to object to the kidnapping instruction provided to the jury and by failing to request or offer a jury instruction on lesser-included offenses, the circuit court said:

Petitioner does not state with specificity what language within the instruction given was in error, or what specific language should have been included. Counsel lists assault, battery, or domestic classifications as alternatives, but cites

no legal authority for where any such crime[s] [are] considered to be [] lessor included offense[s] of kidnapping.

Noting that “[s]pecificity in habeas pleadings is required” by West Virginia Code § 53-4A-2, the circuit court concluded that petitioner’s contention concerning jury instructions had no merit.

On the issue concerning the IAD, the circuit court said:

[Petitioner] argues that his extradition process was flawed when either, the State failed to bring him to trial within 180 days, pursuant to Article III of the [IAD] Act, W. Va. Code §§ 62-14-1 to 7 (2000) or the State took custody without first insuring [petitioner] had waived extradition.

While Petitioner argues that the process was flawed, he fails to cite any legal authority for a constitutional violation that would warrant the granting of a dismissal by this [c]ourt.

Trial counsel filed a Motion to Dismiss pursuant to State v. Somerlot, [209] W. Va. 125, 544 S.E.2d 52 (2000) Following an evidentiary hearing, the Court found that there was no evidence that Form IV had ever been properly served on the State. This Court held that “the requirements of Article III of the Agreement cannot be held to apply, because [petitioner] has failed to strictly comply with the Agreement.”

Additionally, the circuit court found that any defect concerning extradition did not warrant dismissing the charges against petitioner or granting habeas relief. The circuit court stated that petitioner “does not cite, nor is there any legal authority for the proposition that the charges in West Virginia should be dismissed based on Maryland’s failure to comply with extradition law.” Relying on *State v. Flint*, 171 W. Va. 676, 301 S.E.2d 765 (1983), the circuit court denied petitioner’s request for habeas relief on the basis of a flawed extradition process.

Regarding grounds waived by petitioner, the circuit court said, “Petitioner completed a Checklist of Grounds for Post-Conviction Habeas Corpus Relief, which follows the list of grounds provided by the West Virginia Supreme Court of Appeals in [*Losh*].” The circuit court went on to list the thirty-three grounds marked as waived in the *Losh* list attached to the amended petition and concluded that petitioner had waived the right to seek relief on any of those grounds.⁵

⁵ In December of 2018, petitioner, acting without the assistance of his appointed counsel, filed a second *Losh* list. We observe that this second *Losh* list differs in some respects from the *Losh* list attached to the amended petition; however, because the circuit court’s order does not reference the second *Losh* list and because neither petitioner nor respondent discusses the second *Losh* list in their briefs on appeal, we decline to examine the second *Losh* list in this memorandum decision. All further discussion in this memorandum decision concerning petitioner’s *Losh* list shall be concerning the document filed with the amended petition.

Petitioner now appeals the circuit court’s January 29, 2020 order. On appeal, petitioner sets forth three assignments of error through which he argues that the circuit court erred by dismissing his petitions for habeas relief with prejudice without first holding an evidentiary hearing. We have held that,

“[i]n 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.” Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

We begin our analysis by observing that “a petitioner for habeas corpus relief is not entitled, as a matter of right, to a full evidentiary hearing in every proceeding instituted under the provisions of the post-conviction habeas corpus act[, §§ 53-4A-1 to -11].” *Gibson v. Dale*, 173 W. Va. 681, 688, 319 S.E.2d 806, 812-13 (1984). “Indeed, where the allegation[s] in the petition are completely without substance or merit, the statute requires no hearing at all and empowers the court to deny relief summarily.” *Id.* at 688, 319 S.E.2d at 813 (citing *Thomas v. Leverette*, 161 W. Va. 224, 239 S.E.2d 500 (1977)). We have held that “[a] court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing . . . if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court’s satisfaction that the petitioner is entitled to no relief.” Syl. Pt. 1, in part, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973); *see also* W. Va. Code § 53-4A-7(a), in part (“If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or the record in the proceedings which resulted in the conviction and sentence, or the record or records in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, show to the satisfaction of the court that the petitioner is entitled to no relief, . . . the court shall enter an order denying the relief sought.”).

A circuit court’s refusal to hold a full evidentiary hearing is reviewed for an abuse of discretion. *See Gibson*, 173 W. Va. at 688, 319 S.E.2d at 813 (“[T]he post-conviction habeas corpus statute leaves the decision of whether to conduct an evidentiary hearing . . . in large part to the sound discretion of the court before which the writ is made returnable.”). “This discretion is not unlimited, however, and the court must be guided by the necessities of each particular case.” *Id.* at 688-89, 319 S.E.2d at 813. An evidentiary hearing should be held when “it appears to the court . . . 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[.]” W. Va. Code § 53-4A-7(a), in part.

In his first assignment of error, petitioner argues that “it was incumbent upon the [c]ircuit [c]ourt to set this matter for an . . . evidentiary hearing in order to determine the validity of [petitioner]’s *Losh* [l]ist and ascertain exactly which grounds were selected for advancement by [petitioner], and which grounds were waived.” He notes that “the grounds waived [in the *Losh* list]

do not bear [petitioner]’s initials, and the *Losh* [l]ist is neither signed by habeas counsel for [petitioner] nor [petitioner] himself.”

We disagree with petitioner’s contention that an evidentiary hearing was necessary to examine the *Losh* list. In *Losh*, we recognized that “[w]e do not contemplate that [circuit court] judges must laboriously and in open court interrogate petitioners concerning every conceivable ground [for habeas relief].” 166 W. Va. at 770, 277 S.E.2d at 612. Rather, we require only that judges “enter a comprehensive order which addresses not only the grounds actually litigated, but the grounds waived as well.” *Id.* Petitioner has not argued that the circuit court failed to comply with this directive, nor has petitioner argued that the circuit court misinterpreted petitioner’s intentions regarding the *Losh* list. Conspicuously absent from petitioner’s appeal is a claim that the circuit court improperly dismissed a ground for habeas relief as waived that petitioner did not intend to waive. Without such a claim, we must surmise that the *Losh* list accurately reflects the grounds for relief petitioner intended to raise and that the circuit court thoroughly addressed each of those grounds. Accordingly, in that we review a circuit court’s decision to decide a habeas action without a full evidentiary hearing for an abuse of discretion, we conclude that petitioner has failed to establish that the circuit court abused its discretion in this instance.

In his second assignment of error, petitioner argues that he was entitled to habeas relief on the ground that his extradition from Maryland to West Virginia was illegal. He asserts that the applicable IAD forms were not properly completed, and he contends that “[e]xtradition in this case is a constitutional issue because [he] was denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution when there was no state compliance with the provisions of the [IAD].” Petitioner avers that the IAD sets forth a rule of strict compliance and that petitioner “did not benefit from being represented by counsel at an extradition hearing in the State of Maryland upon a request for extradition by the State of West Virginia.” We find no merit to this assignment of error.

In *Flint*, we said that the general rule regarding interstate extradition proceedings is that a prisoner is held under the extradition process only until such time as he reaches the jurisdiction of the demanding state, and is thenceforth held under the process issued out of the courts of that state. Consequently, the regularity of extradition proceedings may be attacked only in the asylum state; after an alleged fugitive has been delivered into the jurisdiction of the demanding state, the proceedings may not be challenged.

171 W. Va. at 683, 301 S.E.2d at 772 (quoting 31 Am. Jur. 2d *Extradition* § 74 (1967)). Following this general rule, the Court held, “Once a fugitive has been brought within the jurisdiction of West Virginia as the demanding state, the propriety of the extradition proceedings which occurred in the asylum state may not be challenged. The extradition proceedings may be challenged only in the asylum state.” *Id.* at 678, 301 S.E.2d at 767, Syl. Pt. 4. Moreover, in *State ex rel. Sublett v. Adams*, 145 W. Va. 354, 115 S.E.2d 158 (1960), we held:

A person who is returned in any manner from one state to another may . . . be tried for a crime committed in the state to which he is returned . . . , and the

method of his return, even though illegal or forcible, does not invalidate his conviction or constitute ground for his release from the penitentiary, under the due process clause of the Fourteenth Amendment.

145 W. Va. at 354, 115 S.E.2d at 158, Syl. Pt. 5.

Under *Flint*, petitioner could only challenge the impropriety of his extradition from Maryland to West Virginia in Maryland. Further, under *State ex rel. Sublett*, even if his extradition to West Virginia was indeed illegal in the manner he claims, his conviction in West Virginia cannot be invalidated on the basis that his extradition was illegal. Thus, because the record clearly shows that petitioner was entitled to no relief on this claim, we conclude that the circuit court did not abuse its discretion by deciding this issue without first holding an evidentiary hearing, nor did the circuit court abuse its discretion in denying petitioner's request for habeas relief on this ground.

Finally, in petitioner's third assignment of error, he argues that the circuit court erred by denying his request for habeas relief on the basis that his contentions concerning the assistance he received from his trial counsel "were factually insufficient." Petitioner argues that "the issues raised across the three petitions were supported and factually sufficient so that the Court could grant an evidentiary hearing," and that "had an [evidentiary] hearing been set by the [c]ircuit [c]ourt, that would have been the opportunity for [petitioner] to show more conclusively whether or not he was able to provide any factual support for any of [his] claims." Petitioner further states, "The failure of the [c]ircuit [c]ourt to at least set an evidentiary hearing result[ed] in [a] habeas proceeding that is hollow and meaningless as far as protecting [petitioner]'s constitutional rights." Petitioner notes that under Rule 4(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, where a habeas petition is lacking in factual specificity, a circuit court may dismiss a habeas petition without prejudice with instructions that the petitioner file another petition with appropriate factual support. We find no merit to this assignment of error.

In actions for habeas relief, "[t]here is a presumption of regularity of court proceedings in courts of competent jurisdiction that remains until the contrary appears, and the burden of proving any irregularity in such court proceedings rests upon the person who alleges such irregularity to show it affirmatively." Syl. Pt. 2, in part, *State ex rel. Scott v. Boles*, 150 W. Va. 453, 147 S.E.2d 486 (1966). Furthermore, West Virginia Code § 53-4A-2 provides, in part, that a petition seeking habeas relief "shall . . . specifically set forth the contention or contentions and grounds in fact or law in support thereof upon which the petition is based." *See also Losh*, 166 W. Va. at 771, 277 S.E.2d at 612 ("[A] petition for a writ of habeas corpus . . . must specifically state in detail the underlying facts that support the claim. A mere recitation of any of our enumerated grounds without detailed factual support does not justify . . . the holding of a hearing.").

Upon our review of this matter, we agree with the findings and conclusions of the circuit court as to petitioner's claim that he received ineffective assistance of trial counsel. The circuit court correctly determined that petitioner's habeas petitions lacked the specificity necessary to justify an evidentiary hearing and habeas relief, and we agree with the circuit court's reasoning as set forth in its order. Additionally, while Rule 4(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia provides, in part, that "the court may enter an order dismissing the petition, without prejudice, with directions that the petition be refiled containing

adequate factual support” where “the petition contains a mere recitation of the grounds without adequate factual support,” we observe that this rule—by its use of the word “may”—is discretionary, and petitioner has made no argument that the circuit court abused its discretion by choosing not to proceed under the rule in this instance. Accordingly, we conclude that the circuit court did not abuse its discretion by deciding petitioner’s ineffective assistance of counsel claim without first holding an evidentiary hearing, nor did the circuit court abuse its discretion in denying petitioner’s request for habeas relief on the basis that he received ineffective assistance of trial counsel.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: January 12, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice William R. Wooton