

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

**Donald Roger Layne,
Petitioner Below, Petitioner**

vs.) **No. 101278** (Tyler County 08-C-56)

**Evelyn Siefert, Warden, Northern Correctional Facility,
Respondent Below, Respondent**

FILED

January 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Donald Roger Layne appeals the circuit court's order denying his *pro se* Rule 35(a) Motion for Correction of Sentence filed in his ongoing proceeding wherein he is seeking a writ of habeas corpus. Petitioner argued that a judgment of acquittal should be entered with respect to his 1967 conviction for first degree murder. The instant appeal was timely filed by the *pro se* petitioner without a designation of the record. The Court has carefully reviewed the written arguments contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present either a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner is an inmate serving a life sentence without mercy for a 1967 conviction for first degree murder. Petitioner filed a Motion for Correction of Sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure and argued that under the law existing at the time of his conviction, he was entitled to a judgment of acquittal when the evidence adduced at trial showed him to be a principal in the second degree after he was indicted as a principal in the first degree. The circuit court denied the motion, ruling as follows:

Petitioner's instant motion attempts to attack the underlying conviction itself and not the substance of the sentence or how the trial court procedurally imposed the subject

sentence. Accordingly, Petitioner's reliance [sic] upon Rule 35(a) of the *West Virginia Rules of Criminal Procedure* is misplaced.

It is the **ORDER** of this Court that Petitioner, Donald Roger Layne's, *Pro Se* "**Motion for Rule 35(a)**" is **DENIED**.

The instant *Habeas Corpus* action shall continue on the Court's active docket.

It is all so ORDERED.

Petitioner now appeals the circuit court's denial of his pro se Rule 35(a) Motion for Correction of Sentence.

The circuit court denied petitioner's *pro se* Rule 35(a) Motion for Correction of Sentence in an ongoing habeas corpus proceeding in which he subsequently received an omnibus hearing on October 28, 2010, with appointed counsel.¹ "We review the decision on the Rule 35 motion under an abuse of discretion standard[.]" Syl. Pt. 1, in part, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996). In denying the *pro se* motion, the circuit court's July 19, 2010, order found that rather than alleging that the petitioner has been the victim of an illegal sentence, "Petitioner's instant motion attempts to attack the underlying conviction itself" and noted that "[t]he instant *Habeas Corpus* action shall continue on the Court's active docket." The circuit court is correct. Rule 35 contemplates correction or reduction of a criminal sentence rather than a challenge to the underlying conviction. Here, petitioner is attempting to challenge the evidentiary basis of his conviction rather than any challenge to his sentence. Thus, the circuit court did not abuse its discretion in denying petitioner's *pro se* Rule 35(a) Motion for Correction of Sentence as it was beyond the scope of the Rule under which it was filed. Petitioner's remaining claims can be addressed in the habeas proceeding.

For the foregoing reasons, we find no error in the decision of the circuit court and the denial of the petitioner's pro se Rule 35(a) Motion for Correction of Sentence is affirmed.

Affirmed.

¹ No evidence was taken at the omnibus hearing; instead, the parties reached an agreement where the habeas proceeding would be dismissed without prejudice so that petitioner could re-file.

ISSUED: January 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh