

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

**Jack Adam Teel,
Petitioner Below, Petitioner**

vs.) No. 11-0204 (Kanawha County 10-MISC-173)

**David Ballard, Warden, Mt. Olive Correctional
Complex, Respondent Below, Respondent**

FILED

October 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jack Adam Teel, pro se, appeals the December 22, 2010, order of the Circuit Court of Kanawha County dismissing his petition for a writ of habeas corpus without a hearing. The respondent warden, by Thomas W. Rodd, his attorney, filed a response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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 is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On March 2, 2006, petitioner pled guilty to fourteen of thirty-six charges brought against him in an indictment. He pled guilty to ten counts of burglary, two counts of wanton endangerment, one count of grand larceny, and one count of possession of a stolen vehicle. Petitioner signed fourteen separate plea agreements. As part of these plea agreements, the State agreed to dismiss the twenty-two additional charges on which petitioner had been indicted.

On June 14, 2006, the circuit court imposed upon petitioner consecutive sentences of one to fifteen years for each of the ten counts of burglary, one to ten years for grand larceny, and one to five years for possession of a stolen vehicle. The circuit imposed concurrent sentences of one to five years for each count of wanton endangerment. Petitioner's aggregate prison term totaled twelve to 165 years.

On April 15, 2010, petitioner filed a petition for a writ of habeas corpus alleging two grounds for relief. First, he alleged that his prison term was disproportionate to the offenses committed.

Second, petitioner alleged that he had received ineffective assistance of counsel in connection with his plea.

On petitioner's proportionality claim, the circuit court noted that "[s]entences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). The circuit court determined that petitioner's sentences were within the statutory limits for the offenses to which he pled guilty and that he did not allege that his sentences were based upon some impermissible factor. Therefore, the circuit court concluded that the sentences were valid.

On petitioner's ineffective assistance claim, the circuit court found that he alleged that his counsel did not inform him of the difference between binding and non-binding plea agreements and that he believed that the State's recommendation of five to seventy-five years would be binding upon the trial court. The circuit court noted that "each of the fourteen written pleas of guilty signed by the petitioner specifically state[d] that 'any plea bargaining which appears in the record of this case is not binding upon the Court with respect to punishment or probation.'" The circuit court determined that by affixing his signature to the written pleas of guilty, "the petitioner was unequivocally indicating his awareness of the non-binding nature of the agreement between himself and the state." The circuit court concluded that without any other facts to support his claim of ineffective assistance, "this Court has no ability to judge the performance of petitioner's trial counsel and, therefore, petitioner's claim regarding ineffectiveness of counsel should be dismissed without prejudice."¹ Accordingly, the circuit court dismissed petitioner's petition for a writ of habeas corpus without a hearing.

STANDARD OF REVIEW

The standard of review for the circuit court's dismissal of petitioner's habeas petition is set forth in syllabus point one of *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006):

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.

"A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition,

¹ In dismissing petitioner's ineffective assistance claim "without prejudice," the circuit court cited to Rule 4(c) of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. Rule 4(c) allows for the re-filing of a petition once it contains "adequate factual support."

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, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

WHETHER PETITIONER'S SENTENCES WERE DISPROPORTIONATE TO THE OFFENSES COMMITTED

Petitioner argues that his sentences should be reviewed to determine whether the sentences were disproportionate to the offenses committed. The circuit court correctly noted, however, that "[s]entences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." Syl. Pt. 4, *Goodnight*, supra. Even if it is assumed, *arguendo*, that petitioner's sentences are subject to proportionality review, the respondent warden argues that petitioner's sentences are not disproportionate to the offenses petitioner committed. First, the respondent warden argues petitioner's sentences do not shock the conscience under the subjective test set forth in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), where petitioner will serve a minimum of twelve years in prison when he has pled to multiple offenses. Under the objective test set forth in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), the respondent warden argues that petitioner's sentences are comparable to those imposed for similar crimes in other jurisdictions based upon statutes from the states of Kentucky, New York, and Washington. After careful consideration, this Court concludes that the circuit court did not err in concluding that petitioner's sentences were valid after evaluating the sentences under *Goodnight*, supra.

WHETHER PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN CONNECTION WITH HIS PLEA

Petitioner argues that his counsel did not inform him of the difference between binding and non-binding plea agreements and that he believed that the State's recommendation of five to seventy-five years would be binding upon the trial court. The circuit court determined that petitioner's allegation that he believed the State's recommendation would be binding was not supported by the record. Because that was the basis of his ineffective assistance claim in the case sub judice, the circuit court dismissed the claim. The circuit court made the dismissal of petitioner's ineffective assistance claim "without prejudice," indicating that it could not evaluate counsel's performance for ineffectiveness without other facts supporting petitioner's claim. Petitioner may re-file his ineffective assistance claim once it is supported by "adequate factual support." See Rule 4(c), supra. Therefore, after careful consideration, this Court concludes that the circuit court did not err in dismissing petitioner's ineffective assistance claim.

For the foregoing reasons, we affirm the decision of the Circuit Court of Kanawha County dismissing petitioner's petition for a writ of habeas corpus.

Affirmed.

ISSUED: October 19, 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