

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

**David Eilola,
Petitioner Below, Petitioner**

vs.) No. 11-0484 (Kanawha County 11-MISC-74)

**William Haines, Warden, Huttonsville
Correctional Complex, Respondent Below,
Respondent**

FILED

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

MEMORANDUM DECISION

Petitioner David Eilola, pro se, appeals the February 16, 2011, order of the Circuit Court of Kanawha denying his petition for a writ of habeas corpus without a hearing. The respondent warden, by Robert D. Goldberg, his attorney, filed a timely response, to which petitioner filed a reply.

The 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 is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was indicted and tried for the felonies of attempted first degree murder, malicious assault, and attempted arson; and for the misdemeanors of violation of a domestic violence protective order and domestic battery.¹ A jury found petitioner guilty of all counts. Petitioner's post-trial motions were denied, and the circuit court sentenced petitioner to consecutive sentences of three to fifteen years, two to ten years, two years, twelve months, and twelve months.

Petitioner was subsequently re-sentenced numerous times for purposes of allowing him to appeal. In *State v. Eilola*, 226 W.Va. 698, 704 S.E.2d 698 (2010), this Court held that petitioner was entitled to have 495 days of credit for time served be applied to the aggregate sentences combined, i.e., having the 495 days deducted from the front end of his sentence.

¹ The victim was petitioner's then-wife.

On October 26, 2010, before this Court had reached its decision in *Eilola*, petitioner filed his first petition for a writ of habeas corpus raising eighteen grounds for relief. The circuit court dismissed petitioner's habeas petition without prejudice on November 5, 2010.

Petitioner filed a second petition for a writ for habeas corpus on February 2, 2011. This petition was identical to Mr. Eilola's first petition except for the fact that it included a nineteenth ground for relief. The circuit court dismissed petitioner's second petition on February 16, 2011, citing, *inter alia*, Rule 4(c) of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. Rule 4(c) provides as follows in pertinent part: "If the petition contains a mere recitation of grounds without adequate factual support, the court may enter an order dismissing the petition, without prejudice, with directions that the petition be refiled containing adequate factual support. The court shall cause the petitioner to be notified of any summary dismissal." In the case sub judice, the circuit court found that "[petitioner]'s petition contains a mere recitation of grounds without adequate factual support, and, therefore, because the petition has failed to demonstrate to this Court's satisfaction that the petitioner is entitled to relief, no hearing is required."² Consistent with Rule 4(c), the circuit court made its dismissal of petitioner's second petition without prejudice and ordered that "[t]he Clerk of this Court shall serve a copy of this order upon the petitioner."

On appeal, petitioner argues that the circuit court lacked the authority and/or jurisdiction to hold the hearings, where he was re-sentenced for purposes of appeal and where the circuit court implemented this Court's mandate from *Eilola*, *supra*. As the respondent warden points out, it is somewhat peculiar for petitioner to make these arguments given that when his appeal was heard in *Eilola*, petitioner obtained partial relief.

The standard of review for the circuit court's dismissal of petitioner's habeas petition is set forth in Syllabus Point One, *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.

After careful consideration, this Court concludes that the circuit court did not abuse its discretion in dismissing petitioner's petition without prejudice. Consistent with Rule 4(c), petitioner may re-file his habeas claims when he has adequate factual support for them.

² Petitioner argues that the circuit court failed to make specific findings of fact and conclusions of law on each issue raised by his habeas petition. However, even assuming *arguendo* that the circuit court's finding is in some way inadequate, this does not necessarily require a remand. *See, e.g., State v. VanHoose*, 227 W.Va. 37, 50 n. 39, 705 S.E.2d 544, 557 n. 39 (2010)(finding that a remand was not necessary "because the record in this case is adequately developed.").

For the foregoing reasons, we find no error in the decision of the circuit court and affirm its order 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