

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

**Keith Burdette,
Petitioner Below, Petitioner**

vs.) **No. 11-0708** (Kanawha County 09-MISC-451)

**David Ballard, Warden, Mount Olive
Correctional Center, Respondent Below,
Respondent**

FILED
September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Keith Burdette appeals, pro se, the December 7, 2011 order of the Circuit Court of Kanawha County dismissing in part and denying in part his petition for a writ of habeas corpus. The respondent warden, by C. Casey Forbes, his attorney, filed a summary 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 that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On December 21, 1987, a Kanawha County jury convicted petitioner of first degree murder and did not return a recommendation of mercy. This Court refused to hear petitioner's direct appeal on December 7, 1988. The Court has also refused prior appeals of denials of habeas corpus relief and an original jurisdiction habeas corpus petition.

In November 2009, petitioner filed a petition for a writ of habeas corpus, his fourth such petition. Mr. Burdette's sole claim was ineffective assistance of habeas counsel in a 1998 habeas proceeding. Mr. Burdette alleged that his habeas counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel for three reasons: (1) trial counsel's alleged failure to investigate, present, and argue mitigating circumstances for the purpose of influencing the jury's mercy determination; (2) trial counsel's alleged failure to move for a bifurcated proceeding; and (3) trial counsel's alleged failure to object to the jury not being given guidelines for factors to consider when deciding mercy.

The circuit court found petitioner's first and second allegations of ineffective assistance should be dismissed without prejudice pursuant to Rule 4 of the West Virginia Rules Governing

Post-Conviction Habeas Corpus Proceedings. Rule 4 provides in pertinent part as follows: “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.” Rule 4(c), W.V.R. Post-Conviction Habeas Corpus Proceedings; *see also Losh v. McKenzie*, 166 W.Va. 762, 771, 277 S.E.2d 606, 612 (1981) (“A mere recitation of any of our enumerated grounds without detailed factual support does not justify the issuance of a writ, the appointment of counsel, and the holding of a hearing.”).

As for petitioner’s third allegation, the circuit court denied it on the merits holding that “petitioner is entitled to no relief on the grounds that his omnibus counsel did not raise the issue that trial counsel failed to object to the lack of standards for juries in making determinations regarding mercy[, utilizing the *Strickland/Miller* analysis].” *See* Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) (adopting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The circuit court explained that the issue that petitioner wanted habeas counsel to raise had been conclusively decided in *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987) (holding that no detailed jury instruction be given regarding factors to be considered when determining mercy), and, therefore, petitioner was not entitled to habeas relief. Accordingly, the circuit court dismissed in part and denied in part petitioner’s habeas petition. The circuit court directed copies of its order be provided to “all counsel and *pro se* parties of record,” complying with Rule 4(c)’s requirement that petitioner be notified of the dismissals without prejudice.

The standard for this Court’s review of the circuit court’s order summarily denying petitioner’s fifth 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.

On appeal, petitioner argues that if the circuit court reviewed the trial transcripts, the court would have found factual support for his first and second allegations of ineffective assistance of habeas counsel and that merely because his third allegation ran contrary to prevailing precedent should not have kept habeas counsel from raising it. The respondent warden argues that the circuit court found that petitioner’s first two allegations of ineffective assistance were “mere recitations of grounds” without adequate factual support and were properly dismissed without prejudice. The respondent warden notes that as permitted by Rule 4(c), petitioner may re-file those claims when he has factual support for them. The respondent warden further argues that the circuit court did not err in summarily denying petitioner’s third allegation when the issue had already been adjudicated in a

previous decision of this Court. After careful consideration of the parties' arguments, this Court concludes that the circuit court did not abuse its discretion in its rulings on the habeas petition.

For the foregoing reasons, we find no error in the decision of the circuit court. The December 7, 2011 order of the Circuit Court of Kanawha County is affirmed.

Affirmed.

ISSUED: September 4, 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