

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

**State ex rel. Amber DeStefano,
Petitioner Below, Petitioner**

vs) No. 11-1063 (Marion County 08-C-294)

**Adrian Hoke, Warden,
Respondent Below, Respondent**

FILED

May 29, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Amber DeStefano, by counsel Paul S. Detch, appeals the Circuit Court of Marion County's order dated June 1, 2011, denying her petition for a writ of habeas corpus. Petitioner argues that the circuit court erred in finding that her trial counsel was effective and in finding that there was no reversible error regarding a specific jury instruction. Warden Adrian Hoke, by counsel Jacob Morgenstern, has filed his response.

This Court has considered the parties' briefs and the appendix 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 appendix 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 convicted following a jury trial of second degree murder in the stabbing death of her boyfriend. After an evening of drinking, petitioner and her boyfriend had an argument that resulted in several physical altercations, initiated by both parties at different times, as testified to by a third person who witnessed the events. Petitioner then stabbed the victim, penetrating his lung, severing an artery, and resulting in his death. Petitioner's direct criminal appeal was refused by this Court. Petitioner then filed a petition for writ of habeas corpus in the circuit court, alleging several errors.

At the omnibus hearing on the petition for writ of habeas corpus, both of petitioner's trial attorneys testified, as did petitioner. Her attorneys testified that they discussed the plea deal with her at length but that petitioner sought acquittal of all charges due to a pending abuse and neglect case against her. Thus, she chose an "all or nothing" defense of self-defense. Further, petitioner's prior counsel testified that they investigated the alleged prior acts of domestic violence by the victim against the petitioner, including a door-to-door canvass of the neighborhood, but there was no corroborating evidence found outside of petitioner's mother. Additionally, petitioner's counsel had petitioner evaluated for Battered Woman's Syndrome by Dr. William Fremouw, who found no evidence of Battered Woman's Syndrome. Petitioner's counsel discussed a second knife found at

the scene, but elected not to pursue the origins of this knife at trial, as there was no evidence that the victim had been the last to touch the knife, nor was there evidence that the victim was somehow wielding the knife during the altercation, as the eyewitness testimony indicated that he was not.

On appeal, petitioner first argues generally that the circuit court erred in failing to grant her petition for a writ of habeas corpus. Petitioner's argument revolves around her use of deadly force to defend herself. Petitioner argues that the State's case implied that she had not been "beaten up enough" to use deadly force against the victim, and, therefore, petitioner should have been acquitted. Petitioner further argues that her trial counsel was ineffective in failing to anticipate this Court's ruling in *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009), which states that one does not have a duty to retreat in one's own home before using deadly force, even when assaulted by a co-inhabitant, and that she was prejudiced in not having the *Harden* ruling, which should be deemed retroactive. Petitioner also argues that her counsel was ineffective in not offering information regarding the second knife into evidence, as it could have raised the possibility that the victim was armed with said knife when he was stabbed. Finally, petitioner argues that although she was convicted of second degree murder, she was prejudiced by the jury instruction on first degree murder because it contained the statement "it is only necessary that said intention [to kill] came into existence at the time of such killing or at any time previous thereof."

In response, the State argues that *Harden* was not controlling law, as it was decided three years after the trial of this matter, and petitioner chose to pursue a claim of self-defense. The State also argues that counsel was not ineffective under *Strickland* and there is nothing in the record that indicates that the trial outcome would have differed if a different defense had been pursued. Furthermore, the State argues that the jury instruction on murder was harmless error, as petitioner was convicted of second degree murder and the instruction was made with regard to first degree murder.

This Court has stated as follows:

"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." Syllabus Point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 2, *State ex rel. Farmer v. McBride*, 224 W.Va. 469, 686 S.E.2d 609 (2009). Petitioner claims ineffective assistance of trial counsel. In West Virginia, claims of ineffective assistance of counsel are governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. See Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Petitioner further argues that the circuit court erred

in allowing the first degree murder instruction. This Court has held that “[w]hether jury instructions were properly given is a question of law.” *State v. Guthrie*, 194 W.Va. 657, 671 n. 12, 461 S.E.2d 163, 177 (1995) (quoting *U.S. v. Morrison*, 991 F.2d 116 (4th Cir. 1993)). Since there was no objection to this jury instruction, the instruction must be reviewed under the “plain error” standard; “[t]he court’s instructions to the jury must be a correct statement of the law and supported by the evidence . . . A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy.” *Guthrie*, 194 W.Va. at 671, 461 S.E.2d at 177.

The Court has fully reviewed the issues raised by petitioner. The Court concludes that the circuit court’s decision to deny habeas corpus relief under the facts and circumstances of this case was proper and hereby adopts and incorporates by reference, and attaches hereto, the well-reasoned “Opinion/Final Order Denying ‘Petition for Writ of Habeas Corpus, Ad Subjiciendum’” entered by the circuit court on June 1, 2011.

For the foregoing reasons, we affirm the circuit court’s decision.

Affirmed.

ISSUED: May 29, 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