

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

**Harvey Patrick Short,
Petitioner Below, Petitioner**

vs.) No. 101330
(Kanawha County 09-MISC-201/288 & 10-MISC-430)

**Teresa Waid, Warden,
Respondent Below, Respondent**

FILED

November 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Harvey Patrick Short appeals the circuit court's denial of his pro se petitions for a writ of habeas corpus on the ground that it was clear that his petitions entitled him to no relief. The instant appeal was timely filed by the pro se petitioner with the entire record being designated on appeal. The Court has carefully reviewed the written arguments contained in the pro se petition for appeal, 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 of Appellate Procedure.

Petitioner suffers from paranoid schizophrenia, but the record reflects that he has been adjudged competent. In September 2005, he robbed a 7-11 convenience store by telling the clerk to open the register. She complied with his direction. Petitioner's plea agreement provided that he would plead guilty to second degree robbery. In exchange, the State would dismiss various other charges, including forgery and battery upon a correctional officer, and would not pursue recidivist charges against petitioner. The State would also make a non-binding recommendation of five to eighteen years in prison, and petitioner would be free to argue for an alternative sentence. Following entry of his guilty plea, the trial court sent him for a pre-sentencing report/diagnostic evaluation.

At the sentencing hearing on January 15, 2009, both petitioner and his trial counsel addressed the court at the sentencing hearing to argue for alternative sentencing. The trial court denied the request for alternative sentencing, noting that petitioner's criminal history spanned four states and that he was likely to re-offend if he was not incarcerated. One of petitioner's post-conviction claims has been that toward the end of the sentencing hearing, the trial court produced an already prepared sentencing order. The trial court sentenced petitioner to five to eighteen years in prison.

In its August 31, 2010 order, the circuit court cancelled the previously scheduled habeas corpus omnibus hearing and denied habeas corpus relief based upon the record. The court ruled as follows:

. . . Petitioner's sentence was pursuant to his conviction for violation of W.Va. Code § 61-2-12(b): "[a]ny person who commit robbery by placing the victim in far bodily injury . . . shall be confined in a correctional facility for not less than five years nor more than eighteen years." Therefore, Petitioner's sentence is in accordance with the statutory guidelines set forth in W.Va. Code § 61-2-12(b).

As a result, the Court finds that Felony Indictment No. 06-F-140 properly set forth a violation of W.Va. Code § 61-2-12(b). Petitioner knowingly plead [sic] guilty of it, and the sentence imposed falls within the discretionary statutory guidelines of such statute. Therefore, the Petitioner's allegations set forth in his Petition for a Writ of Habeas Corpus ad Subjiciendum fail[s] to state a claim upon which relief can be granted.

Accordingly, the circuit court denied petitioner's habeas petition.

Petitioner immediately filed another petition for a writ of habeas corpus. The circuit court again denied relief, finding that "Petitioner's present Petition is based on grounds previously reviewed by the Circuit Court of Kanawha County and does not set forth any new grounds for relief." Petitioner also moved for a reduction of his sentence in his underlying criminal case, which the circuit court dismissed on the ground that "Defendant's Motion is based on grounds previously reviewed by the Circuit Court of Kanawha County and . . . it is hereby res judicata in Case No. 06-F-140."

Petitioner argued that the circuit court erred in deciding his habeas petition without

conducting an omnibus hearing and without allowing counsel to file an amended habeas petition. This Court has reiterated that a circuit court may deny a petitioner's petition without a hearing and without appointing counsel "if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief." Syl. Pt. 3, *Markley v. Coleman*, 215 W.Va. 729, 601 S.E.2d 49 (2004) (*per curiam*). The circuit court determined that the felony indictment against petitioner properly set forth a violation of the second degree robbery statute, West Virginia Code § 61-2-12(b), and that petitioner knowingly pled guilty to it. The sentence imposed, five to eighteen years, falls within the statutory guidelines of West Virginia § 61-2-12(b). "Sentences 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 explained its reasoning for denying alternative sentencing based upon petitioner's criminal history and likelihood that he would re-offend if he was not incarcerated. This Court concludes that petitioner's arguments regarding the sentencing order lack merit.

Pursuant to Rule 4(c) of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings, a subsequent petition for a writ of habeas corpus may be summarily denied "if the contentions in fact or law relied upon in the petition have been previously and finally adjudicated or waived." The circuit court denied petitioner's second petition for a writ of habeas corpus because the grounds on which the petition was based had been previously reviewed. This Court concludes that the circuit court properly denied petitioner's second habeas petition.

For the foregoing reasons, we find no error in the decisions of the circuit court and the denials of Petitioner's pro se petitions for a writ of habeas corpus are affirmed.

Affirmed.

ISSUED: November 10, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh