

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

**John C. Ellevan,
Petitioner Below, Petitioner**

vs.) No. 101582 (Fayette County 10-C-221)

**Adrian Hoke, Warden, Huttonsville
Correctional Center, Respondent Below,
Respondent**

FILED

November 30, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner John C. Ellevan appeals the November 24, 2010 order of the Circuit Court of Fayette County denying his second petition for a writ of habeas corpus following his conviction of second degree sexual assault and domestic battery. Petitioner alleged that there was a failure to match his DNA to the sexual assault and that the victim's statements to the police prior to trial were false and misleading. The instant appeal was timely filed by the petitioner with the entire record being designated on appeal. The Court has carefully reviewed the record and the written arguments contained in the petition, and the case is mature for consideration.

This matter has been treated and considered under the Revised Rules of Appellate Procedure. This 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 prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was accused of battering his girlfriend and raping her fourteen-year-old sister J.W. on July 4, 2003, after he had been drinking heavily at a family reunion. In J.W.'s statement to police at the emergency room about three hours after the rape, she indicated that the situation began when she intervened while petitioner, who was drunk, was beating and choking her sister. J.W.'s sister then ran for help, and J.W. was left behind with petitioner. J.W. gave varying statements about the number of times petitioner raped her, and later at trial, she testified to two rapes. The emergency room examination showed J.W.'s hymen was gone and that there was blood in her vagina. The examining doctor testified that the blood could be from rape or normal sexual activity. There was also some bruising on J.W.'s body. Her own blood was present on her clothing along with the DNA of a secondary donor. There was an insufficient sample to show the identity of the secondary donor of DNA on the clothing.

J.W. testified at trial that she was a virgin prior to the rape. Petitioner denied raping her. However, he had written several letters to J.W.'s family, which were introduced at trial. In the letters, petitioner wrote that they were like family to him, that he did not remember what happened, that he wished he had not been drinking on July 4, 2003, and that he was sorry. The jury convicted petitioner of one count of second degree sexual assault against J.W. and misdemeanor domestic battery against her older sister. The circuit court sentenced petitioner to serve ten to twenty-five years in prison for the second degree sexual assault conviction and a month on the domestic battery conviction, to be served concurrently.

In his direct criminal appeal, petitioner challenged, *inter alia*, the sufficiency of the evidence used to convict him of second degree sexual assault arguing that the lab technicians testified that there was no spermatozoa or seminal fluid matched to petitioner and that while blood samples taken matched J.W., none of petitioner's DNA markers were present. Petitioner also asserted that J.W.'s testimony was inherently unreliable. This Court refused petitioner's direct appeal by an order entered March 15, 2006.

In the instant petition for a writ of habeas corpus, petitioner asserted that his rights under the Fourteenth Amendment to the United States Constitution were violated when: (1) there was a failure to match his DNA to the sexual assault; and (2) J.W.'s statements to the police prior to trial were false and misleading.¹ The circuit court found that petitioner failed to show that he did not previously waive these issues. The circuit court further noted that at trial, petitioner's counsel was quite successful. Petitioner was originally charged three counts of second degree sexual assault, but one count was dismissed at the close of the State's case upon a motion by the defense and the jury acquitted petitioner on another count. Thus, "trial counsel's conduct certainly did not fall below any objective (or even subjective) standard of reasonableness for a criminal defense attorney." Therefore, the circuit court concluded that even if the issues in petitioner's instant habeas petition were not waived, "the end result would [still] have been the same." Petitioner now appeals the circuit court's denial of his instant habeas petition.

Petitioner raises on appeal insufficiency of the evidence based on his contentions that there was a failure to match his DNA to the sexual assault and that J.W.'s statements to the police prior to trial were false and misleading. "[A] jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." Syl. Pt. 3, in part, *State of West Virginia v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). J.W. testified at trial that petitioner raped her. Thus, there was evidence from which the jury could find petitioner guilty beyond a reasonable doubt of one count of second degree sexual assault and a DNA match to petitioner was not necessary. Accordingly, this Court concludes that the circuit court did not err in denying petitioner's instant petition for a writ of habeas corpus.

¹ Petitioner had a prior habeas petition denied by the circuit court that he did not appeal. He subsequently filed an original jurisdiction habeas petition in this Court which refused his petition on February 5, 2009.

For the foregoing reasons, we find no error in the decision of the circuit court and the denial of petitioner's petition for a writ of habeas corpus is affirmed.

Affirmed.

ISSUED: November 30, 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