STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Anthony Pfeffer,
Petitioner Below, Petitioner

vs.) No. 11-0370 (Jackson County 06-C-150)

Thomas McBride, Warden, Mt. Olive Correctional Complex, Respondent Below, Respondent

FILED
June 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Anthony Pfeffer, pro se, appeals the circuit court's December 22, 2010, order denying his second Rule 35(a) motion for correction of sentence. The respondent warden, by Michelle Duncan Bishop, his attorney, filed a timely response, to which petitioner filed a reply brief.

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 record on appeal, and the briefs of the parties, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision is appropriate under Rule 21(d) of the Revised Rules of Appellate Procedure.

In 1985, petitioner robbed the Ripley, West Virginia, Foodland by brandishing a firearm at employees. He stole $5,825 in cash, checks, and food stamps. Two Foodland employees positively identified petitioner, and his fingerprints were found at the scene. Petitioner had no money the day before the crime, but the following day, he took his friends on a shopping spree using cash. Petitioner was later seen burning checks and food stamps. He was indicted for aggravated robbery. *See* W.Va. Code § 61-2-12(a)(1).

Petitioner and the State entered into a plea agreement pursuant to Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, in which petitioner pled guilty to aggravated robbery and would receive a thirty-year sentence to be served concurrent with a sentence imposed in federal court. The plea agreement provided that "[t]he Defendant hereby acknowledges that he has been informed that although this agreement is binding upon the State and the Defendant, the same may be rejected by the Court at any time prior to the imposition of sentence."

At a September 15, 1986, hearing, the circuit court inquired into petitioner's knowledge of and voluntariness in entering the plea agreement. The circuit court then stated that "[t]he plea agreement will be accepted and filed." The court further stated the following: "This matter will be considered for pre-sentence investigation. This acceptance and adjudication of guilt are both conditional upon final approval of the court upon imposition of sentence and the matter will be

investigated before that." The circuit court also expressed some concern that the plea agreement infringed on the court's power to sentence petitioner, particularly because of the concurrent nature of the proposed sentence. Petitioner was represented by Joseph Hash Jr.

Subsequently, a pre-sentence investigation report was filed, in which the probation officer set forth petitioner's criminal record and recommended a harsher sentence. At the sentencing hearing, the State asked the circuit court to reject the plea agreement and impose a harsher sentence, asserting that petitioner had failed a polygraph test and might not have cooperated with a criminal investigation in another county. Petitioner asserted that these things were not required by his plea agreement. The circuit court rejected the plea agreement and set the case for trial.

At trial, the jury found petitioner guilty of aggravated robbery as charged. Petitioner was sentenced to thirty years in prison, to run consecutive to a sentence imposed in federal court. The circuit court cited petitioner's prior criminal record and the use of the firearm in commission of this offense. Petitioner appealed his conviction and sentence to this Court, which was refused in March of 1988.

In June of 2004, petitioner filed a pro se petition for a writ of habeas corpus through which, *inter alia*, he made claims regarding the rejection of the plea agreement. The circuit court did not appoint counsel or hold a hearing on the 2004 habeas petition. By an order of August 19, 2004, the circuit court summarily denied the habeas petition. The circuit court ruled that the trial court rejected the plea agreement after reviewing the adverse pre-sentence investigation report and because the trial court found that the agreement unduly infringed on its sentencing authority. The circuit court ruled that the statements made by the State were harmless and not the basis for the trial court's decision to reject the agreement. Petitioner filed a pro se petition for appeal to this Court, which was refused in June of 2005. A certiorari petition to the Supreme Court of the United States was also refused.

Petitioner filed another habeas petition in the circuit court in November of 2006. Counsel was appointed, and an omnibus hearing was conducted on October 25, 2007, and April 7, 2008. On September 6, 2009, the circuit court entered a final order that denied the habeas petition. The circuit court ruled that many of the issues were addressed in the first habeas proceeding and thus were barred by the doctrine of res judicata, but the court also went on to find that the allegations also lacked substantive merit. The circuit court found that the plea agreement had been accepted only conditionally, pending a pre-sentence investigation. *See* Syl. Pt. 14, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984) (stating that under Rule 11, a circuit court may accept a plea made pursuant to a plea agreement and condition the plea's acceptance upon the receipt of a pre-sentence report, and then may reject the plea agreement after the consideration of the report, in which event the court shall permit the defendant to withdraw his plea). The circuit court ruled that when rejecting the plea agreement, the trial court relied upon the pre-sentence report and the court's concern that the agreement infringed upon its sentencing power, not upon the State's comments.

The circuit court rejected petitioner's claim of ineffective assistance, finding, *inter alia*, that because the trial court did not err in rejecting the plea agreement, counsel did not err by failing to object to the court's action. The circuit court also rejected petitioner's double jeopardy claim, noting

that a nolo contendre or a guilty plea pursuant to a plea agreement and the court's oral pronouncement of a sentence do not impose a double jeopardy bar "where the defendant has not served any portion of the sentence." *See* Syl. Pt. 13, *Myers*, *supra*. Petitioner appealed the circuit court's denial of his 2006 habeas petition to this Court, which was refused by an order entered on January 28, 2010.

Thereafter, petitioner filed two motions for correction of illegal sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure. The circuit court denied the first motion on April 19, 2010, noting that the same issues raised in the motion had already been fully litigated in the prior omnibus habeas corpus action which had been appealed to this Court and refused.

Petitioner filed his second motion for correction of illegal sentence on December 12, 2010, asserting the following claims: (1) counsel was ineffective where counsel failed to object to the trial court's modification of his Type C plea agreement and where counsel failed to object to the State's request that the plea agreement be rejected; and (2) an illegal sentenced was imposed, and double jeopardy was violated, as a result of the trial court's improper rejection of petitioner's plea agreement. The circuit court denied petitioner's second motion for correction of illegal sentence in an order entered on December 22, 2010, finding that "the issues raised by [petitioner] in the December 12, 2010, Motion for Correction of Sentence are [barred by the doctrine of] *res judicata*."

Petitioner now appeals the denial of his second motion for correction of illegal sentence. Petitioner filed a motion to supplement his appendix, which was granted. The respondent warden filed his response brief to petitioner's appeal on July 11, 2011, after being granted an extension of time. Petitioner filed his reply brief on August 1, 2011.

Petitioner argues that the circuit court denied his Rule 35(a) motion without addressing all the issues he raised. The respondent warden argues that the circuit court did not err in denying the motion as the issues raised in the motion had been fully and finally adjudicated and/or waived in petitioner's previous habeas corpus proceedings.

The circuit court has denied a second Rule 35(a) motion for correction of illegal sentence filed by petitioner in a habeas corpus proceeding where he had been provided with appointed counsel and an omnibus hearing. "We review the decision on the Rule 35 motion under an abuse of discretion standard." Syl. Pt. 1, in part, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996). This Court has also held the following:

> A judgment denying relief in post-conviction habeas corpus is *res judicata* on questions of fact or law which have been fully and finally litigated and decided, and as to issues which with reasonable diligence should have been known but were not raised, and this occurs where there has been an omnibus habeas corpus hearing at which the applicant for habeas corpus was represented by counsel or appeared *pro se* having knowingly and intelligently waived his right to counsel.

Syl. Pt. 2, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). In his second motion for correction of illegal sentence, petitioner raises claims that had previously been fully and finally adjudicated earlier in his habeas proceeding. Therefore, this Court concludes that the circuit court did not abuse its discretion in denying petitioner's motion for correction of illegal sentence.[1]

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 29, 2012

CONCURRED IN BY:

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

DISQUALIFIED:

Justice Thomas E. McHugh

[1] Because of this Court's disposition of petitioner's appeal, we do not address the issue of the timeliness of his notice of appeal.