

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

**State of West Virginia,
Plaintiff Below, Respondent**

vs) **No. 11-0771** (Cabell County 10-F-331)

**Donald Good,
Defendant Below, Petitioner**

FILED

June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Donald Good appeals from the Cabell County Circuit Court’s “Jury Guilty Verdict and Sentencing Order” entered on April 6, 2011, sentencing petitioner on his convictions for two counts of kidnapping, ten counts of first degree sexual assault, six counts of second degree sexual assault, and two counts of first degree sexual abuse following a jury trial. Petitioner is represented on appeal by his counsel Gregory L. Ayers. Respondent State of West Virginia is represented by its counsel Laura J. Young.

This Court has considered the parties’ briefs and the record 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 record 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.

On October 19, 2010, petitioner was charged with two counts of kidnapping, two counts of first degree sexual abuse, ten counts of first degree sexual assault, two counts of aggravated robbery, and six counts of second degree sexual assault, all arising from events that occurred in January and February of 1987, involving two women.¹ The State called one witness, Sergeant Michael Pardee of the West Virginia State Police, to testify before the grand jury. Petitioner contends that instead of eliciting testimony from Sgt. Pardee, the prosecuting attorney described petitioner’s alleged conduct and the offenses it allegedly constituted via the questions that he asked of Sgt. Pardee.

¹ Glen Dale Woodall was originally convicted and sentenced for these same crimes. Years later, Mr. Woodall was exonerated by DNA testing that was not available at the time of his convictions.

Prior to trial, petitioner became dissatisfied with his court-appointed counsel, John L. Laishley, and filed a “Motion for the Change of Appointed Counsel for Pending Criminal Trial and Proceedings.” Petitioner alleged in his motion that there had been a complete and irreconcilable breakdown between himself and his attorney and that a conflict of interest had arisen requiring new counsel. A hearing was held on the motion during which petitioner testified and explained why he had lost trust and confidence in his attorney, including, but not limited to, Mr. Laishley’s refusal to request the appointment of co-counsel and Mr. Laishley’s failure to visit petitioner in jail more than twice. Mr. Laishley testified at this hearing and addressed petitioner’s concerns explaining, among other things, why co-counsel was unnecessary and why he believed that he had done everything that he felt should be done in the case. The trial court denied petitioner’s motion for new counsel and ruled that petitioner had not shown good cause to replace his counsel. Petitioner contends that in making its ruling, the trial court failed to inquire of either him or Mr. Laishley about several of petitioner’s complaints.

Petitioner proceeded to trial during which each victim testified to being kidnapped in the parking lot of the Huntington Mall, on January 22, 1987, and February 16, 1987, respectively, after which she was taken to another location and sexually assaulted multiple times and in multiple ways while being threatened with a knife. Both victims testified that the assailant was uncircumcised, as is petitioner. The State connected petitioner to the offenses through his DNA that was identified in the sperm found on the skirt of one of the victims and on the underwear of the other victim. Petitioner’s fingerprints were also identified on the driver’s license of one of the victims. Petitioner testified in his own defense stating that he had never been to the Huntington Mall and did not commit the offenses.

The jury returned its verdict as referenced above and petitioner was found to be not guilty on the two counts of aggravated robbery.

On April 1, 2011, the trial court sentenced petitioner to life with mercy on each of the two kidnapping convictions; ten to twenty-five years in prison on each of the ten first degree sexual assault convictions; ten to twenty years in prison on each of the six second degree sexual assault convictions; and one to five years in prison on both of the first degree sexual abuse convictions. The trial court ordered that all terms of imprisonment imposed were to be served consecutively with each other and consecutive to the life sentence that petitioner was already serving.²

Grand Jury

Petitioner asserts that he was denied his right to a valid indictment when the prosecuting attorney effectively presented unsworn testimony to the grand jury by describing for the sole grand jury witness, Sgt. Pardee, petitioner’s alleged conduct and the offense it allegedly constituted and, thereafter, asking Sgt. Pardee whether he agreed. Because this issue was not raised before the trial

² Petitioner was serving a life sentence with mercy for an unrelated murder conviction in West Virginia at the time of his trial in the case at bar.

court, petitioner states that it should be reviewed under the plain error standard.

Petitioner asserts that a review of the grand jury proceedings reveals that the prosecutor improperly influenced the grand jury to return an indictment thereby denying petitioner his right to a valid indictment by an independent grand jury as guaranteed by Article III, Section 4 of the West Virginia Constitution. Petitioner adds that Sgt. Pardee's brief summary of the crimes for each victim did not provide any evidence addressing the elements of each sexual offense that would be sufficient to return an indictment for the offense. Petitioner argues that the prosecutor's unsworn testimony is plain error affecting petitioner's substantial right to a valid indictment and impacting the fairness and integrity of the grand jury proceeding.

In response, the State asserts that the prosecutor did not give unsworn testimony. The State argues that the grand jury transcript reflects that Sgt. Pardee's grand jury testimony was more than simply giving affirmative responses to the prosecutor's questions. The State notes that Sgt. Pardee's grand jury testimony included a brief summary of the crimes for each victim. The State adds that everything was presented by the prosecutor as a question to Sgt. Pardee. The State asserts that the prosecutor did not exert any improper influence and did not exceed the boundaries of his responsibilities as the prosecuting attorney, thus, plain error does not exist.

"To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Applying this standard to our review of the grand jury proceedings as contained in the appendix record and to the arguments of the parties on appeal, we find no plain error.

Court-Appointed Counsel

Petitioner asserts that he was forced to go to trial on multiple, serious felonies with an attorney in whom he had lost all trust and confidence. Petitioner asserts that while both he and his attorney, Mr. Laishley, testified at the hearing on petitioner's motion for new counsel, the trial court failed to ask either of them about several of petitioner's complaints. Petitioner asserts that this failure amounted to an abuse of discretion, notwithstanding the trial court's comments concerning Mr. Laishley's track record and its awareness of his reputation for thorough trial preparation. Petitioner argues that his complaints went to the heart of the attorney-client relationship and that he gave multiple examples of miscommunications, misrepresentations, and conflicts of interest to indicate why he had lost trust and confidence in his lawyer. Petitioner adds that the trial court's ruling placed undue emphasis on the adequacy of Mr. Laishley's representation rather than on why petitioner was dissatisfied with his counsel.

"Whenever it is suggested to the trial court that an indigent criminal defendant is dissatisfied with his court-appointed counsel, the trial court should conduct a hearing on the record before trial to determine whether good cause exists to discharge a court-appointed counsel and appoint another." Syl. Pt. 3, *Watson v. Black*, 161 W.Va. 46, 239 S.E.2d 664 (1977). Here, the trial court held such a

hearing on petitioner’s motion for new counsel. “While an indigent defendant is entitled to competent counsel, he . . . may only reject representation by his court-appointed counsel for good cause.” Syl. Pt. 2, in part, *Id.* In *Watson*, we further explained that “[g]ood cause for the relief of a court-appointed counsel consists of: (1) a conflict of interest; (2) a complete breakdown in communication with court-appointed counsel after the exhaustion of good faith efforts to work with counsel; or, (3) an irreconcilable conflict which might lead to an unjust verdict.” Syl. Pt. 5, *Id.* Based upon our consideration of the parties’ arguments, our review of the transcript of the hearing held on petitioner’s motion for new counsel, and our review of the trial court’s order denying petitioner’s motion for new counsel entered on March 28, 2011, we find no error in the denial of the motion.³

Conclusion

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 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

³We express no opinion in this Memorandum Decision on any claims that petitioner might elect to assert in the future concerning his court-appointed counsel by way of a petition for a writ of habeas corpus.