

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

**Richard Paulding,
Petitioner Below, Petitioner**

vs) **No. 11-1000** (Cabell County 10-C-445)

**Marvin Plumley, Warden,
Respondent below, Respondent**

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Richard Paulding, by counsel A. Courtenay Craig and John A. Proctor, appeals the Circuit Court of Cabell County's order entered on May 31, 2011, denying petitioner habeas corpus relief. Warden¹ Plumley, by counsel C. Casey Forbes, has filed a response.

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.

Petitioner was convicted by a jury of five counts of third-degree sexual assault and one count of attempted sexual assault. No direct appeal has been filed, although petitioner has been resentenced twice for purposes of a direct appeal. Petitioner filed a petition for writ of habeas corpus in the circuit court, arguing insufficient evidence, cumulative error, and ineffective assistance of counsel. After an omnibus hearing, the petition for writ of habeas corpus was denied.

This Court reviews appeals of circuit court orders denying habeas corpus relief under the following standard:

"In reviewing challenges to 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

¹ Pursuant to Rule 41(c) of the West Virginia Revised Rules of Appellate Procedure, we have replaced the respondent's name with Marvin Plumley, Warden. The initial respondent on appeal, Teresa Waid, is no longer the warden at Huttonsville Correctional Center. This Court notes, however, that petitioner is currently housed at Denmark Correctional Center.

law are subject to *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 first argues that there was insufficient evidence to convict him on all six counts. However, this Court has found as follows:

Except in extraordinary circumstances, on a petition for habeas corpus, an appellate court is not entitled to review the sufficiency of the evidence. *Riffle v. King*, 302 F. Supp. 992 (N.D.W.Va. 1969), and *Young v. Boles*, 343 F.2d 136 (4th Cir. 1965). That question is an appropriate one for review on appeal.

Cannellas v. McKenzie, 160 W.Va. 431, 436, 236 S.E.2d 327, 331 (1977). Finding no extraordinary circumstances in this matter, this Court will not review the sufficiency of the evidence, finding this assignment of error more suited for direct appeal.

Petitioner also argues that counsel was ineffective in numerous ways, and but for these cumulative errors, petitioner would have received a fair trial and the outcome of the trial would have been different. Petitioner argues that his counsel failed to gather alibi evidence, failed to utilize a certain photograph as evidence, and failed to obtain all of the victim's medical records. He also argues that counsel failed to object properly. The State argues that there were not cumulative errors in this action, and that petitioner's counsel was not ineffective. Moreover, many of counsel's actions were dictated by trial strategy, and different actions would not have affected the outcome of the trial. Having reviewed the circuit court's "Amended Findings of Fact and Conclusions of Law Denying Petition for Writ of Habeas Corpus" entered on May 31, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to this assignment of error. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

Finally, petitioner argues that the circuit judge failed to maintain his role as a neutral arbiter during the habeas proceedings and thus denied him a fair proceeding. Petitioner argues that the fact that the judge asked many different questions to witnesses shows that he was acting in the role of a prosecutor rather than a judge. The State argues that petitioner does not give a single instance of biased conduct, but relies merely on the number of questions asked by the judge. After a careful review of the transcripts in this matter, this Court finds no evidence that the circuit judge was biased against the petitioner or acted in any manner that was not neutral.

For the foregoing reasons, we affirm the circuit court's decision. This Court also directs the circuit court to resentence petitioner for purposes of a direct appeal, and directs petitioner's counsel to file a direct appeal within thirty days of the resentencing.

Affirmed.

ISSUED: November 19, 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