

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

**Barry Lee Ayers,
Petitioner Below, Petitioner**

vs.) No. 11-1097 (Cabell County 10-C-353)

**West Virginia Department of Corrections,
Respondent Below, Respondent**

FILED

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

MEMORANDUM DECISION

Petitioner Barry Lee Ayers, by counsel Carl J. Dascoli Jr., appeals the June 22, 2011, order of the Circuit Court of Cabell County denying his petition for writ of habeas corpus. The respondent, by counsel Jake Morgenstern, filed a summary response.

The 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 February 13, 2009, petitioner entered a *Kennedy* plea of guilty to one count of first degree arson pursuant to a plea agreement with the State. He was thereafter sentenced to a determinate term of eight years of incarceration. Following his sentencing, the circuit court denied petitioner's motion for reconsideration and his pro se motion for reduction of sentence, though no direct criminal appeal was ever undertaken. On May 4, 2010, petitioner filed a pro se petition for writ of habeas corpus and was thereafter appointed counsel. On November 30, 2010, petitioner, by counsel, filed an amended petition for writ of habeas corpus alleging ineffective assistance of trial counsel. On May 19, 2011, the circuit court held an omnibus evidentiary hearing during which both petitioner and his prior counsel testified. Following the hearing, the circuit court denied petitioner habeas relief.

On appeal, petitioner alleges that it was an abuse of discretion for the circuit court to deny his petition for writ of habeas corpus and also alleges that his trial counsel was ineffective. In support of his assignments of error, petitioner argues that the plea negotiations in his criminal proceedings overwhelmingly favored the prosecution's agenda of a lengthy prison sentence. He argues that he received no benefit of his trial counsel's experience as an attorney, and asserts that he could have received the same eight-year sentence by representing himself below. According to petitioner, he would have benefitted from a preliminary hearing because information obtained could have served as a basis for a motion to exclude his confession.

In response, the State argues that the circuit court was correct to deny the petition for habeas relief because petitioner's trial counsel performed effectively throughout the criminal proceedings, including investigating the scene of the crime, interviewing fire officials, and keeping in constant contact with petitioner. According to the State, after petitioner's application for alternative sentencing was denied, his counsel bargained for a plea agreement that was twelve years below the statutory maximum term of incarceration for the crime. The State argues that these facts establish that petitioner failed to satisfy either prong of the test for ineffective assistance of counsel as set forth in syl. Pt. 1, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

This Court has previously held that

[i]n reviewing challenges to the 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 law are subject to a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). After careful consideration of the parties' arguments, this Court concludes that the circuit court did not abuse its discretion in denying the petition for writ of habeas corpus. Having reviewed the circuit court's "Order" entered on June 22, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we find no error in the decision of the circuit court and its June 22, 2011, order denying the petition for writ of habeas corpus is affirmed.

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