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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Michael E. Brown,
Petitioner Below, Petitioner

vs.) No. 21-0084 (Cabell County No. 17-C-662)

Donnie Ames, Superintendent, Mt. Olive Correctional Complex,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Michael E. Brown, by counsel Robert P. Dunlap II, appeals the Circuit Court of Cabell County's January 6, 2021, order denying him habeas relief. Respondent Donnie Ames, Superintendent, Mt. Olive Correctional Complex, by counsel Patrick Morrisey and Mary Beth Niday, filed a response. Petitioner filed a reply.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In March of 1999, petitioner was convicted of the first-degree murders of Ronald Davis and Greg Black (collectively, the "victims") following a jury trial. The State's evidence consisted primarily of the testimony of various of petitioner's friends, two of whom, Matthew Fortner and Joe France, were indicted alongside petitioner. One of petitioner's friends testified that petitioner admitted to shooting the victims, and Mr. Fortner testified that he accompanied petitioner to rob the victims and witnessed petitioner shoot them. After finding petitioner guilty of the two murders, the jury granted petitioner mercy. The court sentenced petitioner to two life terms of incarceration and ordered that the sentences be served consecutively.

Petitioner appealed to this Court and raised twelve assignments of error. *See State v. Brown*, 210 W. Va. 14, 552 S.E.2d 390 (2001). The Court found that a few errors occurred but that they were harmless and not so numerous as to amount to cumulative error. *Id.* at 29, 552 S.E.2d at 405. Accordingly, petitioner's convictions were affirmed, but the Court reversed petitioner's sentence because a presentence report was not prepared, and it remanded the case for the preparation of that report and a new sentencing hearing. *Id.* at 28-29, 552 S.E.2d at 404-05.

Following remand (and the preparation of a presentence report), petitioner was again sentenced to consecutive life terms of incarceration, with mercy. Later, he filed his first petition for a writ of habeas corpus. In that first habeas proceeding, petitioner argued, among other things, that a juror's failure to disclose certain information during voir dire regarding her son's indictment created a presumption of prejudice on that juror's part and a presumption of prejudice against petitioner. Following an omnibus evidentiary hearing on all of petitioner's claims, he was granted habeas relief on the juror issue. The warden appealed that ruling to this Court in *Coleman v. Brown*, 229 W. Va. 227, 728 S.E.2d 111 (2012). The Court reversed the circuit court's decision, finding that petitioner had failed to show any bias or prejudice from the challenged juror's participation in his trial and that there was no evidence that the challenged juror's service infringed upon any of petitioner's constitutional rights. *Id.* at 235-36, 728 S.E.2d at 119-20. The Court, however, remanded the case to the circuit court "for further proceedings with regard to any unresolved habeas issues."[1] *Id.* at 236, 728 S.E.2d at 120.

The circuit court issued an "Order Denying Amended Petition for Post-Conviction Habeas Corpus Ad Subjuiciendum on Two Remaining Issues" following remand, which petitioner appealed to this Court. *See Brown v. Coleman*, No. 14-0134, 2014 WL 6607517 (W. Va. Nov. 21, 2014)(memorandum decision). Petitioner also appealed the circuit court's denial of his motion for a new trial based on newly discovered evidence. *Id.* at *1. This Court found no error in the circuit court's denial of either the motion for a new trial or the remaining habeas issues. *Id.* at *2.

In what is now his third bite at the apple, petitioner filed the instant habeas petition on November 27, 2017, and, later, an amended petition. First, petitioner claimed that he received ineffective assistance of prior habeas counsel. Before prior habeas counsel was retained by petitioner, another attorney assisted him at the habeas stage and identified eight ways in which trial counsel was allegedly ineffective. Petitioner claimed that once prior habeas counsel was retained, however, counsel "pressured" petitioner to waive these grounds, which amounted to ineffective assistance because the claims were "very strong claims that call into question the fairness of his trial."[2]

[1] In a footnote, the Court recounted that petitioner filed two cross-assignments of error with the Court, one pertaining to the discovery of mental health records of a witness who testified at petitioner's trial and the second pertaining to the proper interpretation of a statute relating to juror disqualification. *Coleman v. Brown*, 229 W. Va. 227, 236 n.10, 728 S.E.2d 111, 120 n.10 (2012). The Court stated that "[t]hese issues are still pending in the [petitioner's] underlying habeas corpus action and have not been considered by the circuit court[, so they] . . . may be pursued through the [petitioner's] pending habeas proceeding." *Id.*

[2] Petitioner retained two attorneys to assist him with his first habeas petition; however, his criticisms were primarily levied against the one he identified as "lead counsel."

In a separate ineffective assistance of prior habeas counsel claim, petitioner alleged that prior habeas counsel failed to ensure that all grounds raised were adjudicated following this Court's remand in his first habeas proceeding. Specifically, prior habeas counsel purportedly failed to ensure the adjudication of Ground 9, asserting that he was denied the right to confront a witness against him; Ground 10, asserting that petitioner received a disparate sentence compared to his codefendants; and Ground 11, asserting that the cumulative effect of trial errors deprived him of a fair trial.

In petitioner's third ground for habeas relief, he asserted that he was denied effective assistance of trial counsel and alleged that certain trial errors deprived him of a fair trial. Fourth, he claimed that the habeas court, in his first habeas proceeding, erroneously relied on the transcript of the omnibus evidentiary hearing rather than conduct a second omnibus hearing following remand from this Court. Petitioner argued in his fifth ground for relief that the trial court erred in failing to declare a mistrial after Mr. Fortner testified that he took two tests, presumably polygraph examinations. Sixth and finally, petitioner argued that the cumulative effect of all errors deprived him of a fair trial.

The parties appeared for an omnibus evidentiary hearing on December 1, 2020. Counsel for petitioner stated that "[t]he focus is on [petitioner's prior habeas] counsel . . . with respect to [the] ineffective assistance of counsel argument and the other items laid out in his most recent petition." But petitioner's counsel said that "we have made [the] decision" not to call prior habeas counsel, and petitioner offered only his own testimony on that claim. Petitioner testified that "there was a breakdown [in the working relationship with prior habeas counsel] when they told me to drop my ineffective claims or proceed with my petition." Petitioner stated that prior habeas counsel told him that "he did not like to attack lawyers with ineffective assistance of counsel claims and he wasn't comfortable doing it, so in order for us to proceed with the petition I need to drop it and then he will proceed to file the petition." Petitioner also testified that he believed it was unnecessary to call prior habeas counsel to testify in this proceeding because "[e]verything is on the record, everything is reflected in the transcripts, and it's well documented, it's all on the record, so I didn't see a need for it."

On cross-examination, petitioner was asked why he chose not to relieve prior habeas counsel. Petitioner explained that he

> went on their advice, and I felt that I was being pressured into dropping those claims. And I had already forked out, my family had already forked out a large amount of money for them to represent me, and I was pretty much at my rope's end, so I took it as though I dropped the claims and we'll proceed and my other claims have enough merit to overcome my burden, but I think they were erroneous in doing that.

The habeas court denied relief. It found that petitioner's various asserted grounds for relief were "merely 'background' explanation for why [prior habeas counsel] allegedly should have pursued an ineffective assistance of trial counsel claim. Because all of [p]etitioner's other grounds have been litigated and denied or waived, this [ineffective assistance of prior habeas counsel] is the only issue before this [c]ourt." The habeas court found that

> underlying habeas counsel was **retained** by petitioner. He could have retained other counsel if he disagreed with his counsel's strategy. Alternatively, he could have requested an appointed attorney had he been in indigent circumstances. His decision to accept the recommendation of his counsel and waive the ineffective assistance of trial counsel claim was his choice.

The habeas court found further that "the representation of petitioner's trial counsel was objectively sufficient in that it comports with representation by a reasonable attorney in the same or similar circumstances" and that "many of the issues to which [p]etitioner asserts error have already been considered and dismissed by the [West Virginia Supreme Court of Appeals]." Finally, the habeas court found that even if prior habeas counsel should have asserted that trial counsel was ineffective in petitioner's first habeas, petitioner had not satisfied his burden of establishing that there was a reasonable probability that, but for counsel's errors, the result of his first habeas would have been different. The court concluded that "the alleged errors that have not already been considered on appeal are insufficient to suggest a probable alternate outcome."

It is from the court's January 6, 2021, order denying habeas relief that petitioner appeals, and our review is guided by the following standard:

> In 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).

Petitioner raises six assignments of error on appeal. First, he argues that the habeas court erred in denying his claim that prior habeas counsel was ineffective for coercing him to waive his ineffective assistance of trial counsel claims. Second, he argues that the habeas court erred in denying his claim that prior habeas counsel was ineffective for failing to ensure adjudication of outstanding habeas claims following remand in his first habeas proceeding. Third, he claims error in the habeas court's denial of his ineffective assistance of trial counsel claim. Fourth, he claims error in the court's "fail[ure] to adjudicate un-exhausted habeas corpus claims" following remand in his first habeas proceeding. Fifth, he asserts that the trial court erred in failing to give a curative instruction or declare a mistrial following Mr. Fortner's testimony that he took two tests. Sixth and finally, petitioner argues cumulative error "throughout the underlying criminal case and subsequent habeas proceedings."

In Syllabus Point 2 of *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), we held that

> [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.

Further,

> [a] prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

Id. at 762-63, 277 S.E.2d 608, Syl. Pt. 4.

With these well-established principles in mind, we must necessarily narrow the scope of our review of petitioner's appeal. Petitioner has had both a direct appeal and one prior habeas proceeding, complete with an omnibus evidentiary hearing. Petitioner's prior habeas proceeding is, therefore, res judicata as to both matters raised and those that should have been known, and any subsequent habeas proceeding—like this one—must be limited to the grounds identified above. As petitioner's ineffective assistance of habeas counsel claim is the only claim upon which he could petition for relief, we find no error in the habeas court's conclusion that only that claim was viable in this successive habeas proceeding, and our review is likewise limited to that claim. Specifically, we decline to address petitioner's third, fourth, fifth, and sixth assignments of error as each implicates grounds that were raised or could have been raised in his first habeas proceeding. "[W]e do not believe that a prisoner is entitled to habeas corpus upon habeas corpus," and we continue to adhere to that belief. *Id.* at 766, 277 S.E.2d at 610 (citation omitted); *see also* Syl. Pt. 1, *Markley v. Coleman*, 215 W. Va. 729, 601 S.E.2d 49 (2004) ("[Our] [p]ostconviction habeas corpus statute . . . clearly contemplates that [a] person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one postconviction habeas corpus proceeding[.]") (citation omitted).

In his first assignment of error, he alleges that prior habeas counsel was ineffective for failing to present his ineffective assistance of trial counsel claims. These claims alleged that trial counsel was ineffective for (1) failing to object to the presence of a thirteenth juror during deliberations, (2) failing to request a limiting instruction or move for a mistrial following Mr. Fortner's testimony regarding having taken two tests, (3) withdrawing petitioner's motion to continue four days prior to trial, (4) failing to object to the discharge of a late juror, (5) failing to object to juror affidavits regarding the thirteenth juror's participation in deliberations, (6) failing to object to the trial court going off the record, and (7) failing to object to a jury instruction.[3] In

[3] Petitioner also contends that the ineffective assistance of trial counsel claims were properly presented because prior habeas counsel incorporated by reference previous filings that asserted those claims. As set forth below, and as petitioner has simultaneously acknowledged, the record shows that he waived his ineffective assistance of trial counsel claims.

his second assignment of error, he contends that prior habeas counsel was ineffective for failing to ensure that all grounds raised in his prior habeas proceeding were addressed following remand by this Court. In particular, petitioner claims prior habeas counsel failed to ensure that his claim that he was denied the right to confront a witness against him, his disparate sentence claim, and his cumulative trial error claim were adjudicated.

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

In petitioner's habeas petition that is the subject of this appeal, he acknowledged that once he retained prior habeas counsel, he "equivocate[d] in his desire to preserve, present, and prove that he suffered ineffective assistance of his trial counsel." Petitioner ultimately accepted and "went on" prior habeas counsel's advice to waive the claims, and he completed a *Losh* checklist evidencing his waiver and representing that "the above list was thoroughly discussed and considered as possible grounds to be included within" his petition for habeas relief.[4] As he explained at the omnibus hearing below, petitioner decided to "proceed" under the belief that his "other claims have enough merit to overcome my burden." Petitioner, therefore, does not demonstrate coercion by prior habeas counsel so much as he demonstrates regret on his part. But "[i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time *refraining from engaging in hindsight or second-guessing of counsel's strategic decisions*." Syl. Pt. 2, in part, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995) (emphasis added) (citation omitted).

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence [or habeas ruling], and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Street v. Mutter, No. 18-0779, 2020 WL 261739, *4 (W. Va. Jan. 17, 2020)(memorandum decision) (quoting *Strickland*, 466 U.S. at 689). Petitioner's regret in deciding on a post-

[4] *See Losh v. McKenzie*, 166 W. Va. 762, 768-69, 277 S.E.2d 606, 611 (1981) (identifying "the most frequently raised" grounds in habeas that counsel should discuss with a habeas petitioner).

conviction strategy with prior habeas counsel's advice does not demonstrate that prior habeas counsel coerced him into waiving his claims, so we find no error in the habeas court's conclusion that it was petitioner's choice to waive the claims.

We further find that the grounds petitioner claims prior habeas counsel failed to ensure were adjudicated following remand were, likewise, waived or abandoned. According to the first habeas court's order granting habeas corpus relief, before reversal by this Court, petitioner submitted a "Hearing Memorandum on Amended Petition for Post[-]Conviction Habeas Corpus Ad Subjiciendum" identifying the outstanding issues for consideration as (1) reconsideration of a juror's presumption of bias and (2) the "Fortner issues." The "Fortner issues" included "Fortner's mental health," the "[p]olygraph issue," the "withholding of Fortner *Brady* materials," and "[t]he Fortner issue as newly discovered evidence." The habeas court held an omnibus hearing on December 14, 2010, on these remaining issues, and it recounted that, aside from those issues identified above, "[n]o other issues were raised at the hearing and are hereby deemed waived." Petitioner does not contend that this waiver was coerced. In fact, he does not address this waiver at all. Without more from petitioner, it cannot be said that prior habeas counsel's strategic decision to focus petitioner's claims was objectively unreasonable.

Finally, while petitioner's failure to satisfy the first prong of the *Strickland*/*Miller* test alone supports the habeas court's denial of his ineffective assistance claims, *see Daniel*, 195 W. Va. at 317, 465 S.E.2d at 419, Syl. Pt. 5, in part ("In deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland* . . . and *Miller*, . . . but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test."), we nevertheless further agree with the lower court's conclusion that petitioner's claims fail under the second prong as well. Petitioner offers nothing more than his conclusory belief that, "had [prior] habeas counsel presented [the ineffective assistance of trial counsel] claims, his conviction would have been overturned," and "but for [prior] habeas counsel [failing to ensure] full adjudication of all remaining issues, the outcome of his habeas corpus proceedings would have resulted in his conviction being overturned." But he fails to offer any analysis, argument, or explanation of how the result of the prior proceeding could possibly have been different if, for instance, the claim had been raised that trial counsel was ineffective for failing to object to the presence of a thirteenth juror. This Court has already ruled that "we do not believe there is a reasonable possibility that the thirteenth juror's mere presence during jury deliberations caused the jury to convict rather than acquit." *Brown*, 210 W. Va. at 20, 552 S.E.2d at 396. Nor does he explain how he would have succeeded in habeas had he alleged that trial counsel was ineffective for failing to object to the discharge of a juror who was late to trial when we have already determined that "[t]here is no evidence that participation by the discharged juror would have changed the jury verdict, or that the juror who took his place was prejudiced against the [petitioner]." *Id.* at 21, 552 S.E.2d at 397.

The Court is further left without an explanation, let alone a convincing explanation, for how asserting that trial counsel was ineffective for withdrawing petitioner's motion to continue four days before trial would have afforded him habeas relief. The basis of that motion, in large part, was that petitioner needed additional time to meet the State's evidence. *See id.* at 24, 552 S.E.2d at 400. The Court has already concluded that petitioner could not demonstrate that he was prejudiced by the trial court's denial of his motion, which occurred prior to his eventual

withdrawal of it, because petitioner obtained his expert's lab reports that he was awaiting, because he had sufficient opportunity to review other evidence he claimed he needed more time to review, and because his counsel "thoroughly questioned" witnesses at trial whose pretrial interviews were purportedly not complete. *Id.* Thus, we were "unable to conclude that the trial court abused its discretion [in denying a continuance], much less that the [petitioner] was prejudiced by plain error." *Id.* In other words, we cannot see how petitioner could successfully argue that trial counsel was ineffective for failing to press baseless grounds for a continuance.

In one final illustration of how petitioner's claim of prejudice lacks substance, we observe that he fails to explain how prior habeas counsel was ineffective in failing to ensure adjudication of his disparate sentence claim on remand where petitioner's codefendants were ultimately convicted of fewer and different crimes and were, therefore, not similarly situated. *See State v. Watkins*, 214 W. Va. 477, 481, 590 S.E.2d 670, 674 (2003) ("We believe that the appellant's claim of disparate sentencing is untenable given the guilty pleas and subsequent convictions to two separate and distinct offenses by the appellant and the codefendant; it is clear that the appellant and the codefendant were not similarly situated; therefore, we find no merit to this assignment of error."). Simply put, petitioner has not and cannot demonstrate that the result of his prior habeas proceeding would have been different had these and other equally meritless and/or previously adjudicated claims been advanced.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

NOT PARTICIPATING:

Justice C. Haley Bunn