

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

**Gary D. Martin,
Petitioner Below, Petitioner**

vs) No. 17-0116 (Fayette County 16-C-156-H)

**Ralph Terry, Acting Warden,
Mt. Olive Correctional Complex,
Respondent Below, Respondent**

FILED

June 29, 2018

**EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Gary D. Martin, by counsel Kelly C. Pritt, appeals the January 17, 2017, order of the Circuit Court of Fayette County denying his petition for writ of habeas corpus.¹ Respondent Ralph Terry, Acting Warden, Mt. Olive Correctional Complex,² by counsel Shannon Frederick Kiser, filed a summary response and then a supplemental summary response in support of the circuit court's order. Petitioner filed a reply.

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

On April 22, 2008, a jury found petitioner guilty of two counts of first-degree murder and one count of second-degree murder. With regard to petitioner's first-degree murder convictions,

¹Although Attorney Pritt was appointed to represent petitioner in this appeal and filed a brief on his behalf, she was later permitted to withdraw as petitioner's counsel and petitioner was allowed to proceed pro se. By amended scheduling order entered November 14, 2017, this Court granted petitioner's motion to file a supplemental brief, which was previously filed on September 28, 2017.

²Since the filing of the appeal in this case, the warden at Mount Olive Correctional Complex has changed and the acting warden is now Ralph Terry. The Court has made the necessary substitution of parties pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure.

the jury made recommendations of mercy. On June 2, 2008, the circuit court sentenced petitioner to two life terms of incarceration, with the possibility of parole, for his first-degree murder convictions and to a determinate term of forty years of incarceration for his second-degree murder conviction. The circuit court ordered that petitioner serve his sentences consecutively. Petitioner sought review of his convictions and sentences before this Court, which refused his appeal by order entered April 4, 2009.

On May 27, 2016, petitioner filed a petition for writ of habeas corpus, alleging twenty-two grounds for relief. In a comprehensive order entered January 17, 2017, the circuit court grouped petitioner's grounds into three categories: (1) grounds based on the actions of the prosecution; (2) grounds based on the actions of the circuit court; and (3) grounds alleging ineffective assistance by petitioner's trial attorneys. The circuit court noted that "[t]he undersigned [j]udge, having presided over . . . [p]etitioner's underlying criminal case from arraignment, pre-trial hearings, jury trial, to sentencing, is thoroughly familiar with all proceedings in said case." Having carefully reviewed the "case file, including trial transcripts," the circuit court "conclude[d] that the relevant facts of the case *sub judice* have been sufficiently and adequately developed and that the [c]ourt can now rule upon the [p]etition as a matter of law without a hearing." The circuit court found that petitioner's grounds for relief were without merit and denied his habeas petition.

Petitioner now appeals the circuit court's January 17, 2017, order denying habeas relief. We apply the following standard of review in habeas appeals:

"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).

Syl. Pt. 1, of *Anstey v. Ballard*, 237 W.Va. 411, 787 S.E.2d 864 (2016).

On appeal, petitioner argues that the circuit court erred in denying his habeas petition without a hearing and appointment of counsel. Respondent counters that the circuit court properly denied the petition. We agree with respondent. As we held in syllabus point three of *Anstey*:

"A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief. Syllabus Point 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973). Syl. Pt. 2, *White v. Haines*, 215 W.Va. 698, 601 S.E.2d 18 (2004)."

237 W.Va. at 412, 787 S.E.2d at 866.

Petitioner points out that, in *State ex rel. Watson v. Hill*, 200 W.Va. 201, 205, 488 S.E.2d 476, 480 (1997), we directed the circuit court to hold a hearing on a habeas petitioner's ineffective

assistance of trial counsel claim. However, in *Watson*, we indicated that a hearing might not have been ordered if the circuit court had made findings adequate to show that petitioner's claim would have failed under the applicable *Strickland/Miller* standard for ineffective assistance,³ stating that “[i]f that was the court's reasoning, it should have been included in the order[.]” *Id.* at 204, 488 S.E.2d at 479. Here, we find that the circuit court made extensive and detailed findings establishing that the record from the underlying criminal case was sufficiently developed to show petitioner's eight claims of ineffective assistance lacked merit. Therefore, we conclude that, under the facts and circumstances of this case, a hearing on those claims was not necessary.

Petitioner further argues that the circuit court judge who presided over his criminal case should not have presided in his habeas proceeding given that the judge would be reviewing his own rulings. We find that petitioner's argument is contrary to longstanding and well-reasoned West Virginia precedent. As we found in *Hill*, a judge who presided in the criminal case “is sufficiently familiar with the underlying proceedings to determine most of the issues presented by the [p]etitioner without a hearing.” *Id.* Here, we find that the circuit court noted that “[t]he undersigned [j]udge . . . presided over . . . [p]etitioner's underlying criminal case from arraignment, pre-trial hearings, jury trial, to sentencing” and also carefully reviewed the “case file, including trial transcripts.” Therefore, we conclude that there was no issue on which it was necessary for the circuit court to hold a hearing.

Finally, petitioner argues that the United States and West Virginia Constitutions require the appointment of counsel in habeas cases. We reject this argument as contrary to syllabus point three of *Anstey*. As the Supreme Court of the United States reiterated in *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), as a matter of constitutional law, “there is no right to counsel in collateral proceedings.” Therefore, we conclude that the circuit court did not abuse its discretion in denying petitioner's habeas petition without a hearing and appointment of counsel.

Having reviewed the January 17, 2017, “Order,” we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to all of 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 affirm.

Affirmed.

ISSUED: June 29, 2018

³ In West Virginia, claims of ineffective assistance of counsel are governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the following: (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. *See* Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) (adopting *Strickland*).

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Elizabeth D. Walker

Justice Allen H. Loughry II, suspended and therefore not participating.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on October 9, 2018, the following order was made and entered:

Gary D. Martin,
Petitioner Below, Petitioner

vs) No. 17-0116

Ralph Terry, Acting Warden,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

ORDER

The Court, on October 4, 2018, having maturely considered the petition for rehearing filed by the petitioner, Gary D. Martin, *pro se*, is of the opinion to and does hereby refuse said petition for rehearing.

Justice Allen H. Loughry II suspended and therefore not participating. Justice Paul T. Farrell sitting by temporary assignment.

A True Copy

Attest: /s/Edythe Nash Gaiser
Clerk of Court



A-242

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on July 19, 2018, the following order was made and entered **in vacation**:

Gary D. Martin,
Petitioner Below, Petitioner

vs.) No. 17-0116

Ralph Terry, Acting Warden,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

ORDER

On July 19, 2018, the petitioner Gary D. Martin, *pro se* filed a motion for extension of time to file a petition for rehearing.

Upon consideration whereof, the Court is of the opinion to and does hereby grant the motion. It is ordered that the deadline for filing a petition for rehearing is extended to August 28, 2018. Any response deemed necessary shall be filed within fourteen days of receipt of this order.

Justice Loughry, Allen H., II suspended and therefore not participating.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court



A - 24 (

**Additional material
from this filing is
available in the
Clerk's Office.**