FILED
May 26, 2022
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Ricky Pendleton,
Petitioner Below, Petitioner

vs.) No. 21-0432 (Berkeley County No. 19-C-181)

Donald Ames, Superintendent,
Mt. Olive Correctional Center
Respondent Below, Respondent

MEMORANDUM DECISION

Self-represented petitioner Ricky Pendleton appeals the May 3, 2021, order of the Circuit Court of Berkeley County that denied his petition for post-conviction habeas corpus relief. The State, by counsel Patrick Morrissey and Scott E. Johnson, respond in support of the circuit court's order. 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 order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

On May 22, 1996, petitioner was indicted by a Berkeley County grand jury for: (1) kidnapping; (2) malicious wounding; (3) grand larceny; and (4) aggravated robbery (Case No. 96-F-103). Those charges stemmed from an incident in which petitioner and an accomplice brutally beat Ryan Frankenberry and robbed him of his wallet and vehicle. *Pendleton v. Ballard*, No. 12-0653, 2013 WL 2477245, at *1 (W. Va. May 24, 2013) (memorandum decision). The beating was so severe that Mr. Frankenberry required multiple surgeries to repair the damage done to his facial bones, including the insertion of numerous titanium screws and plates. *Id.* A petit jury convicted petitioner on all counts, and recommended mercy on the kidnapping count. *Id.* The trial court sentenced petitioner to life in prison, with mercy, for his kidnapping conviction; two to ten years in prison for his malicious wounding conviction; one to ten years in prison for his grand larceny conviction; and sixty years in prison for his aggravated robbery conviction. *Id.* The court ordered the sentences to run consecutively to one another and to a prior federal sentence imposed upon petitioner. *Id.*

ISSUE ONE: Whether the circuit court abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void, and with given notice of a "plain error" doctrine violation committed a CONSTRUCTIVE AMENDMENT, where it had instructed the petit jury on three (3) new elements such as "conceal"; "enticement"; and "entice away" which was not alleged in the indictment for the charge of kidnapping?

ISSUE TWO: Whether the circuit court had abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void, and with given notice of a "plain error" doctrine violation where the indictment was so defective to wrongfully allege with "INTENT TO CAUSE BODILY INJURY" instead of the proper statutory language for the charge of malicious assault.

ISSUE THREE: Whether the circuit court had abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void and with given notice of a "plain error" doctrine violation of NOT fully and plainly informing of the nature and cause based on the COMMON-LAW DEFINITION at precedence for the charge of aggravated robbery.

ISSUE FOUR: Whether the circuit court had abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void and with given notice of a "plain error" doctrine violation NOT properly the "VALUE" of the 1987 Porsche which was alleged stolen for a charge of grand larceny.

ISSUE FIVE: Whether the circuit court had abused its discretion due to its failure to apply the law, in a manner consistent with due process of law by its denial of Motion 60(b)(1), (4), and (6) from its mistake, unavoidable cause, judgment is void and with given notice of a "plain error" doctrine violation committed DOUBLE JEOPARDY, by charge and conviction of both greater and lesser-included offense for the charges of robbery and grand larceny WITHOUT alleging two additional offenses separating both charges.[1]

Respondent, Donald Ames, Superintendent, Mt. Olive Correctional Center, correctly summarizes petitioner's five assignments of error into the following single assignment of error: The circuit court abused its discretion in denying petitioner's motion for relief under Rule 60(b) of the West Virginia Rules of Civil Procedure. Respondent concludes that petitioner failed to show (1)

[1] We note that petitioner, who filed this appeal (No. 21-0432) with the Court on May 25, 2021, raises the exact same five issues that he raised in an appeal that he filed on May 13, 2021. *See State v. Pendleton*, No. 21-0384.

> one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

"It is a well settled principle of law that a Rule 60(b) motion seeking relief from a final judgment is not a substitute for a timely and proper appeal." *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993). Therefore, "[a]n appeal of the denial of a Rule 60(b) motion . . . brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." *Toler*, 157 W. Va. at 784, 204 S.E.2d at 89.

The movant bears the burden of proof under Rule 60(b). *See, e.g.*, *Powderidge*, 196 W. Va. at 706, 474 S.E.2d at 886 ("A circuit court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it."); *State ex rel. Charleston Area Med. Ctr., Inc., v. Kaufman*, 197 W. Va. 282, 289, 475 S.E.2d 374, 381 (1996) ("Rule 60(b) imposes a heavy burden on the movant[.]"), *overruled on other grounds by Burkes v. Fas-Chek Food Mart, Inc.*, 217 W. Va. 291, 617 S.E.2d 838 (2005). Moreover, "the weight of authority supports the view that Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit." *Powderidge*, 196 W. Va. at 705, 474 S.E.2d at 885. "In other words, a Rule 60(b) motion to reconsider is simply not an opportunity to reargue facts and theories upon which a court has already ruled." *Id.* at 706, 474 S.E.2d at 886. Here, petitioner fails to carry his burden on appeal as he does no more than disagree with the circuit court's substantive ruling. "[D]isagreement with the merits of the underlying judgment simply is not a reason for relief under Rule 60(b)." *Bell v. McAdory*, 820 F.3d 880, 883 (7th Cir. 2016). At best, his appellate brief simply restates the arguments he raised in his two prior petitions for habeas relief before this Court, which the Court rejected. Thus, petitioner fails to satisfy the requirements of Rule 60(b) and, therefore, to show that the circuit court abused its discretion in denying relief.

Finally, "[w]hile a defendant is entitled to due process of law, he is not entitled to appeal upon appeal, attack upon attack, and Habeas corpus upon Habeas corpus. There must be some end to litigation[.]" *Call v. McKenzie*, 159 W. Va. 191, 194, 220 S.E.2d 665, 669 (1975). That end time has come for petitioner.

Accordingly, for the foregoing reasons, we affirm the circuit court's May 3, 2021, order denying petitioner habeas relief.

Affirmed.

ISSUED: May 26, 2022

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

RICKY VINCENT PENDLETON, PETITIONER

VS.

DONNIE AMES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI OF RICKY VINCENT PENDLETON

APPENDIX B:

The refusal of the Petition for rehearing February 9, 2023

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on February 9, 2023, the following order was made and entered:

Ricky Pendleton,
Petitioner Below, Petitioner

vs.) No. 21-0432

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

ORDER

The Court, having maturely considered the petition for rehearing filed by the petitioner Ricky Pendleton, self-represented, is of opinion to and does refuse the petition for rehearing.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

RICKY VINCENT PENDLETON, PETITIONER

VS.

DONNIE AMES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI OF RICKY VINCENT PENDLETON

APPENDIX C:

The Mandate February 16, 2023

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on February 16, 2023, the following order was made and entered:

Ricky Pendleton,
Petitioner Below, Petitioner

vs.) No. 21-0432

Donald Ames, Superintendent,
Mt. Olive Correctional Center
Respondent Below, Respondent

MANDATE

Pursuant to Rule 26 of the Rules of Appellate Procedure, the memorandum decision previously issued in the above-captioned case is now final and is certified to the Circuit Court of Berkeley County (Case No. 19-C-181) and to the parties. The decision of the circuit court is affirmed, and it is ordered that the parties shall each bear their own costs. The Clerk is directed to remove this action from the docket of this Court.

A True Copy

Attest: /s/Edythe Nash Gaiser
Clerk of Court