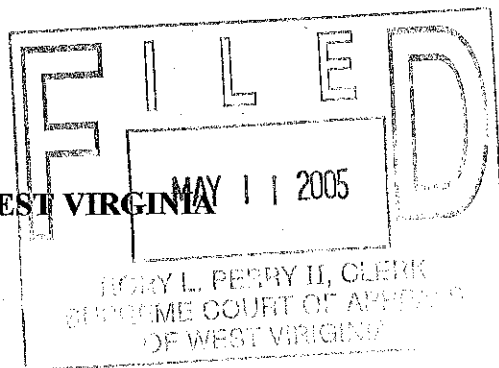


No. 050862

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CARROLL EUGENE HUMPHRIES,

Petitioner,

v.

**THE HONORABLE JAMES J. ROWE,
JUDGE, 11TH JUDICIAL CIRCUIT,**

Respondent.

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Introduction

This matter is before this Court pursuant to a Petition for Writ of Mandamus filed by Petitioner, Carroll Eugene Humphries, on April 15, 2005. Petitioner asserts that Respondent, Judge James J. Rowe, should be ordered to hold a hearing upon the Petitioner's Writ of Habeas Corpus, Amended Petition for Writ of Habeas Corpus, Brief on the Conflict of Interest Issues with Respect to Trial Counsel, and Motion for Reconsideration and Request for Hearing. Petitioner specifically alleges that Respondent be ordered to hold a fair and full Omnibus Habeas Corpus Hearing which encompasses all of the pleadings heretofore filed and at the completion of such hearing to immediately issue a full comprehensive written order addressing all of the issues raised.

Statement of Facts

In response to Petitioner's Petition for Writ of Mandamus, Respondent submits a brief history of the case for the Court's review. Examination of the underlying file in Greenbrier County Civil Action Number 01-C-58 indicates that on March 28, 2001, Petitioner filed his original Petition under W. Va. Code §53-4A-1 For Writ of Habeas Corpus. An Order was entered on June 12, 2001 denying Petitioner's Writ of Habeas Corpus, application to proceed in forma pauperis and affidavit, motion for appointment of counsel, and motion for an omnibus post-conviction habeas corpus evidentiary hearing stating that the habeas corpus petition did not contain any factual allegations and that there was no probable cause to believe that the Petitioner may be entitled to some relief. Thereafter, Petitioner retained counsel, William C. Forbes, and a Notice of Hearing was filed on October 2, 2001 for Petitioner's Motion to Amend Petition. Based upon a review of Petitioner's other habeas corpus file, case number 02-C-79, Petitioner also filed a Petition for Writ of Habeas Corpus and an Amended Petition for Writ of Habeas Corpus in the Circuit Court of Fayette County on January 16, 2002 and March 18, 2002, respectively. By Order entered on April 5, 2002, the Circuit Court of Fayette County stated that all of the witnesses necessary for the resolution of the issues raised are situate in Greenbrier County and accordingly transferred the civil action to the appropriate venue of the Circuit Court of Greenbrier County. An Order was entered by Respondent on April 16, 2002 which found that there was probable cause to believe that the Petitioner may be entitled to some relief and that all the contentions and grounds advanced had not been previously and finally adjudicated or waived. Therefore, Respondent ordered that Petitioner shall, within 30 days, file an Amended Habeas Corpus Petition raising all issues in conformance with omnibus habeas corpus procedures or certify that the petition of March 18, 2002 raised all issues known or which with reasonable

diligence would become known. Petitioner's counsel sent a letter to Respondent, which was filed on May 2, 2002, stating that the Amended Petition of March 18, 2002 raised all issues known to the Petitioner or which with reasonable diligence would become known. The State filed an Answer and Motion to Dismiss Amended Petition for Writ of Habeas Corpus on May 17, 2002.

Petitioner states that an "evidentiary" hearing on the Writ of Habeas Corpus was held on November 14, 2002. This assertion is incorrect in that Petitioner's counsel, William C. Forbes, moved to continue the action from November 14, 2002. Respondent granted the Motion to Continue from November 14, 2002 to January 23, 2003 at 9:15 a.m. Petitioner filed another Motion to Continue on January 8, 2003 to have the case continued from January 23, 2003 to February 13, 2003 at 1:30 p.m. Petitioner filed yet another Motion to Continue on February 21, 2003 and there being no objection by the State, Respondent entered an Agreed Order for Continuance, which continued the hearing from February 13, 2003 to April 23, 2003, at 9:15 a.m. The actual hearing was held on April 23, 2003. During that hearing, Petitioner's counsel, William C. Forbes, and State's attorney, Stephen R. Dolly, presented witnesses, A. Andrew McQueen and Paul S. Detch. During this hearing, Respondent gave the Petitioner an opportunity to amend his Petition for Writ of Habeas Corpus and allowed counsel for Petitioner and the State time to brief issues concerning the alleged conflict of interest by Petitioner's trial counsel. A 'Motion to Amend Petitioner's Motion for Writ of Habeas Corpus' was filed on May 22, 2003. Petitioner also filed a 'Factual Background From Petition of Writ of Habeas Corpus' on May 27, 2003. Petitioner filed a 'Motion for Summary Judgment' on August 11, 2003 stating that the State had thirty (30) days to file their proposed findings of fact and conclusion of law and had failed to do so. An Order was entered on August 26, 2003 scheduling a hearing on Petitioner's Amended Motion for Writ of Habeas Corpus to be held on

October 15, 2003. A hearing on the Amended Motion was held on October 15, 2003. Respondent heard argument of counsel and deferred its ruling allowing the State two weeks to submit anything additional. Respondent, on its own motion, ordered that the hearing set for December 31, 2003 be rescheduled to January 9, 2004. Another hearing was held on February 25, 2004. The State filed their 'Proposed Findings of Fact and Conclusions of Law' on March 19, 2004. Petitioner filed his 'Response to Respondents Proposed Findings of Fact and Conclusions of Law' on April 8, 2004. The parties appeared again on July 13, 2004 for a status hearing. Respondent ordered that, upon request of Petitioner, Petitioner be given fourteen (14) days to file additional pleadings on any issue raised by the United States Supreme Court's decision in *Crawford v. Washington*, 147 Wash.2d 424, 54 P.3d 656, and the State was given fourteen days after receipt of Petitioner's pleading to respond. Based upon a review of the file, no pleadings or motions were filed by the Petitioner or the State concerning *Crawford v. Washington*. A status hearing was held on January 12, 2005. During that hearing, as reflected by the Order entered on January 12, 2005, Respondent discussed the basis for the Court's decision and denied the Petition. Petitioner's counsel once again raised issues concerning former trial counsel's possible conflict of interest. Respondent allowed counsel for Petitioner an additional period of two weeks to brief the issue and advised the State that it had two weeks to reply upon receipt of Petitioner's brief. On January 31, 2005, Petitioner asked for an additional week in which to brief the issue concerning former trial counsel's possible conflict of interest, which was granted by Agreed Order. Petitioner filed his 'Brief on the Conflict on the Issues of Rulings Made by the Court' on February 7, 2005, which Petitioner notes in his Petition for Writ of Mandamus was a typographical error and should have been titled 'Brief on The Conflict of Interest Issues With Respect to Trial Counsel'. Petitioner filed a 'Motion for Reconsideration and Request for Hearing'

on March 14, 2005. On April 15, 2005, Petitioner filed a Writ of Mandamus with this Honorable Supreme Court. The State filed a 'Response to Petitioner's Brief on the Conflict on the Issue of Rulings Made by the Court' on May 9, 2005.

Discussion of Law and Standard of Review

Before Supreme Court of Appeals may properly issue a writ of mandamus three elements must coexist: (1) the existence of a clear legal right in petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. Cooper v. Gwinn, 171 W. Va. 245, 248 S.E.2d 781 (1981), *See Also, United Mine Workers of America v. Miller*, 291 S.E.2d 673 (1982). Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do in violation of their duty. State ex rel. Buxton v. O'Brien, 97 W. Va. 343, 125 S.E. 154 (1924). A trial court or other inferior tribunal may be compelled to act in a case if it unreasonably neglects or refuses to do so. State ex rel. Cockowska v. Knapp, 147 W. Va. 699, 130 S.E.2d 204 (1963). Mandamus is an extraordinary writ and does not lie to direct the exercise of discretion. State ex rel. Summerfield v. Maxwell, 148 W. Va. 535, 135 S.E.2d 741 (1964). A writ of mandamus will not be issued in any case when it is unnecessary or when, if used, it would prove unavailing, fruitless or nugatory. Delardas v. Morgantown Water Comm'n, 148 W. Va. 776, 137 S.E.2d 426 (1964). Though the writ of mandamus will be denied where another and sufficient remedy exists, if such other remedy is not equally as beneficial, convenient and effective, mandamus will lie. State ex rel. Lemley v. Roberts, 164 W. Va. 457, 260 S.E.2d 850 (1979).

Argument

Petitioner asserts that Respondent had a clear legal duty to conduct a full and fair “omnibus habeas corpus hearing” that addresses all the legal issues raised by Petitioner’s Writ of Habeas Corpus and subsequent pleadings and to draft a comprehensive order. Petitioner further states that because Respondent did not fulfill any of these mandated clear legal duties, and continues to violate said duties, Respondent clearly fails to follow the mandates of W. Va. Code §53-4A-1, the Rules promulgated by the West Virginia Supreme Court of Appeals governing post-conviction habeas corpus proceedings, specifically Rule 9, and the Judicial Canons. Petitioner states that Respondent has a judicial duty to dispose of cases promptly and efficiently as set forth in West Virginia Code of Judicial Conduct, Canon 3(8), which requires that “[a] judge shall dispose of all judicial matters promptly, efficiently, and fairly.” Finally, Petitioner alleges that as a result of these violations, Respondent has caused and continues to cause Petitioner great prejudice and his prolonged and unwarranted incarceration.

Petitioner argues that the Code of Judicial Conduct indicates that a violation of this particular Canon could result in disciplinary charges against a judge for unreasonable delay by a judge in disposing of a case. *See Matter of Sommerville*, 364 S.E.2d 20 (W. Va. 1987). While Respondent acknowledges that a considerable amount of time has lapsed since Petitioner first filed his Petition for Habeas Corpus, a large portion of the delay has come from Petitioner’s counsel requesting continuances and failing to submit authority after requesting the necessary time to do so.

Upon hearing the Petitioner’s and State’s evidence and witnesses, Respondent exercised its discretion in determining that the decision should be deferred until all authority had been filed with Respondent and given careful consideration. As Petitioner states in his Writ of Mandamus, Petitioner was

granted leave of court to file an additional memorandum/brief outlining the Petitioner's position and supporting legal authority on the conflict of interest issue of trial counsel after the hearing of April 23, 2003. During the hearing of January 12, 2005, Petitioner asked once again for leave of court to brief the issue as to the conflict of interest of trial counsel, which was granted by Order entered January 12, 2005. After Petitioner filed his brief on the conflict of interest of trial counsel on February 7, 2005, the State, pursuant to the Order entered January 12, 2005, was given time to file a response to Petitioner's brief. The State submitted a 'Response to Petitioner's Brief on the Conflict on the Issues of Rulings Made by the Court' on May 9, 2005. According to State's Response, Respondent left the issues concerning the alleged conflict of interest by Petitioner's trial counsel open to be briefed for the Court prior to the Court's final ruling on Petitioner's Petition. Petitioner did not file a brief on the alleged conflict of interest by Petitioner's trial counsel until February 7, 2005, nearly two years after the issue was raised.

Respondent has been giving this Petition for Writ of Habeas Corpus and its grounds for relief careful consideration and has been acting upon it within reasonable periods of time while managing a busy docket, especially a significant abuse and neglect docket. Respondent has held several hearings as to Petitioner's Petition for Writ of Habeas Corpus, considered all pleadings filed by both Petitioner and the State, reviewed transcripts, has made preliminary findings, and has granted Petitioner's requests for continuances for hearings and additional time to submit authority. Respondent is in good faith endeavoring to perform his duty as he perceives it to be. As stated in Petitioner's Writ of Mandamus, "[a] habeas corpus petitioner is entitled to careful consideration of his grounds for relief, and the court before which the writ is made returnable has a duty to provide whatever facilities and procedures are necessary to afford the petitioner an adequate opportunity to demonstrate his entitlement to relief." Gibson v. Dale, 173 W. Va.

681, 319 S.E.2d 806 (W. Va. 1984).

Respondent waited the requisite amount of time in which to see if the State was going to file a response. Some two weeks later, Petitioner filed a 'Motion for Reconsideration and Request for Hearing'. One month passed from the time Petitioner filed his Motion for Reconsideration and Request for Hearing to the filing of this Writ of Mandamus. Respondent does not find that this is an unreasonable amount of time to issue a decision and ruling in this habeas proceeding. The Writ of Mandamus filed with this Court is entirely premature and without factual and legal basis.

Petitioner is correct in his assertion that Chapter 53-4A-7(c) of the West Virginia Code states that "[w]hen the court determines to deny or grant relief, as the case may be, the court shall enter an appropriate order with respect to the conviction or sentence in the former criminal proceedings and such supplementary matters as are deemed necessary and proper to the findings in the case, including, but not limited to, remand, the vacating or setting aside of the plea, conviction and sentence, arraignment, retrial, custody, bail, discharge, correction of sentence and resentencing, or other matters which may be necessary and proper. In any order entered in accordance with the provisions of this section, the court shall make specific findings of fact and conclusions of law relating to each contention or contentions and grounds (in fact or law) advanced, shall clearly state the grounds upon which the matter was determined, and shall state whether a federal and/or state right was presented and decided. Any order entered in accordance with the provisions of this section shall constitute a final judgment, and, unless reversed, shall be conclusive."

Petitioner is also correct in stating that Rule 9 of the West Virginia Post-Conviction Habeas Corpus Proceedings states: "[t]he court shall draft a comprehensive order including: (1) findings as to whether a state and/or federal right was presented in each ground raised in the petition; (2) findings of fact and

conclusions of law addressing each ground raised in the petition; (3) specific findings as to whether the petitioner was advised concerning his obligation to raise all grounds for post conviction relief in one proceeding; and (4) if the petitioner appeared pro se, specific findings as to whether the petitioner knowingly and intelligently waived his right to counsel.

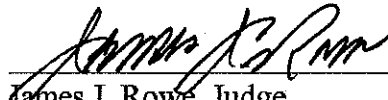
However, whereas W. Va. Code, 53-4A-7(c) and Rule 9 of the West Virginia Post-Conviction Habeas Corpus Proceedings provide that the court shall draft a comprehensive order after the omnibus hearing, Respondent cannot issue such a comprehensive order until all evidence has been presented, briefs on the issues raised during the hearings have been submitted and all have been properly and carefully considered by Respondent. Thus, Petitioner cannot correctly assert that Respondent has failed to abide by the law based on the fact that a written comprehensive order has not been issued.

Furthermore, while Petitioner stated in his Motion for Reconsideration that he requested a hearing, Petitioner never requested an actual hearing date or filed a Notice of Hearing. Given this, Respondent exercised the discretion afforded him, by waiting to see if the State was to file a response and had every reason to believe that Petitioner would request an actual hearing date. Accordingly, Respondent did not schedule a hearing on Petitioner's Motion because no actual date was requested. Upon receipt of this Writ of Mandamus, Respondent set the matter for hearing to be held on May 20, 2005 at 9:30 a.m.

Conclusion

Respondent properly exercised the discretion afforded him by the law of the State of West Virginia. Furthermore, another sufficient remedy exists in that following the hearing on May 20, 2005, Respondent will issue a final comprehensive written order setting out the reasons for a ruling. Thus, a Writ of Mandamus should not be entered against Respondent.

Respectfully submitted,

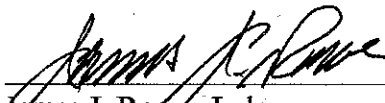
A handwritten signature in black ink, appearing to read "James J. Rowe", written over a horizontal line.

James J. Rowe, Judge
Eleventh Judicial Circuit

CERTIFICATE OF SERVICE

I, James J. Rowe, Judge for the Eleventh Judicial Circuit of West Virginia, do hereby certify that a true and exact copy of the foregoing "Response To Petition For Writ of Mandamus" was served upon the Petitioner's counsel, by depositing the same postage prepaid in the United States Mail, this 10th day of May, 2005, addressed as follows:

William C. Forbes, Esq.
28 Ohio Avenue
Charleston, West Virginia 25302



James J. Rowe, Judge
Eleventh Judicial Circuit