

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
SER. DAVID ROSENBERGER,

Petitioner,

v.

///

Civil Action No. 01-C-331
(N. Edward Eagloski, II, Chief Judge)

HOWARD PAINTER, Warden,
Mount Olive Correctional Complex,

Respondent.

2007 MAY -6 PM 3:48
FILED
DOUGLAS A. WRIGHT, CLERK
PUTNAM CO. CIRCUIT COURT

ORDER

Comes now the Court following an evidentiary hearing in the above-styled matter on the 12th day of May, 2004, wherein the petitioner seeks a Writ of Habeas Corpus Ad Subjiciendum. The petitioner has heretofore agreed that this hearing was to be treated as an omnibus hearing on all grounds which the petitioner desires to raise for habeas corpus relief.

Based upon the evidence presented, as well as a review of the file in this matter, the Court makes the following findings of fact and conclusions of law:

1. That Indictment No. 26 was returned in Criminal Case No. 95-F-42 by the July, 1995 term of the grand jury charging the petitioner with the felony offense of Murder in the First Degree as a result of the murder of Mr. John Fallecker which occurred in October, 1987;
2. That Charles Damron was appointed to represent the defendant/petitioner on or about the 14th day of July, 1995;
3. That on or about the 16th day of August, 1995 James M. Casey was also appointed to represent the defendant/petitioner as co-counsel;

4. That the matter proceeded to jury trial, and the defendant/petitioner was convicted by a jury verdict on or about November 2, 1995 of the felony offense of First Degree Murder, and the jury did not add a recommendation of mercy;
5. That following the defendant's/petitioner's conviction, the Court sentenced the petitioner on the 30th day of May, 1996 to life imprisonment without the possibility of parole;
6. That on or about the 27th day of July, 2001, the petitioner filed his petition for Post-Conviction Habeas Corpus relief, and an Amended Petition for Writ of Habeas Corpus Ad Subjiciendum was filed on or about the 15th day of May, 2002;
7. That on the 12th day of May, 2004, the Court held a hearing on the amended petition, and testimony was presented from James M. Casey; William C. Forbes; Phillip Morrison; and William Rardin;
8. That the defendant's/petitioner's Petition for post-convictions habeas corpus relief is based on the following grounds:
 - a. Ineffective assistance of counsel.
 - b. Denial of Mistrial based on prosecutor vouching/bolstering witness testimony.
 - c. Failure to properly instruct jury regarding testimony of Dr. Sopher.
 - d. Failure to grant new trial based on state failing to prove the crime occurred in Putnam County.
 - e. Insufficient evidence to support conviction of First Degree Murder.
 - f. Failure of court to make an analysis regarding missing, potentially exculpatory evidence from the Department of Public Safety.
 - g. Failure to grant mistrial on basis that Prosecutor utilized the testimony of Kathy Cottrill.
 - h. Improper jury instruction.
 - i. Cumulative effect of individual errors.

The Court will now address the petitioner's grounds for post-convictions habeas corpus relief pursuant to *W. Va. Code* §53-4A-7:

1. Ineffective Assistance of Counsel:

- a. A state right is being advanced by the petitioner;
- b. That claims of ineffective assistance of counsel are governed by the two-prong test set forth in *Strickland v. Washington*, 466 US 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984);
- c. The evidence in the record indicates that James M. Casey, co-counsel for the petitioner at trial, had approximately seventeen (17) years experience as an attorney at the time of the petitioner's trial, and had prior experience trying approximately five (5) or six (6) murder cases to a jury, and had obtained at least three (3) acquittals;
- d. The evidence in the record indicates that Charles Damron met with the defendant/petitioner numerous times, and that James Casey met with the defendant/petitioner one or two times prior to trial in preparation for the trial;
- e. The evidence in the record indicates that trial counsel for the defendant/petitioner were given discovery in the case;
- f. The evidence in the record indicates that trial counsel for the defendant/petitioner had employed the services of a private investigator to assist them in preparing for the defendant's/petitioner's trial;

- g. The evidence in the record indicates that trial counsel (James Casey) for the defendant/petitioner had gone to the scene where the victim was killed;
- h. The evidence in the record indicates that trial counsel for the petitioner had obtained the names of potential witnesses in the case, and had attempted to locate and speak to each of the potential witnesses;
- i. The evidence in the record indicates that trial counsel for the defendant/petitioner had discussed a plea offered extended by the State of West Virginia with the petitioner;
- j. The evidence in the record indicates that the plea offer extended by the State was on the table and available to the defendant even while the jury was deliberating the case;
- k. Dr. Cyril Wecht was retained by counsel for the petitioner to review the case. Dr. Wecht opined in his report "that the attorneys who represented Mr. Rosenberger did not provide adequate representation." Dr. Wecht further opined that "this decedent died from cranial injuries combined with decreased consciousness from alcohol intoxication.";
- l. The Court notes that Dr. Wecht did not have the benefit of reviewing the autopsy report and/or slides from the original autopsy, and that Dr. Wecht's opinion as to the cause of death is inconsistent with what Kathy Cottrill testified that the defendant had told her about the murder;
- m. That counsel for the defendant/petitioner did not employ the use of experts to offer testimony regarding the defendant's use of drugs and

alcohol at the time of the victim's death, nor to challenge the cause of death of the victim;

- n. That the defendant's use of drugs and alcohol on the date of the murder was presented to the jury during the defendant's/petitioner's testimony at trial, and that counsel did not perceive the need to have the defendant/petitioner psychologically evaluated;
 - o. That counsel for the defendant/petitioner testified that he believed that the information contained in the autopsy report was favorable to the defendant's/petitioner's theory of the case;
 - p. Based upon the evidence presented during these proceedings, as well as the entire record in this matter, this Court does not find that counsel's performance was deficient under an objective standard of reasonableness, nor does this Court find that but for counsel's unprofessional errors, that the outcome of the trial would have been different.
2. Denial of Mistrial based on prosecutor vouching/bolstering witness testimony.
- a. A state right is being advanced by the petitioner;
 - b. The prosecution may argue all reasonable inferences to the jury from the evidence in the record; and
 - c. Based upon the evidence presented, as well as the evidence contained in the record in this matter, this Court finds that the petitioner has failed to demonstrate that he was unfairly prejudiced by statements made by the prosecutor during the closing arguments.

3. Failure to properly instruct the jury regarding the testimony of Dr. Sopher.
 - a. A state right is being advanced by the petitioner;
 - b. The petitioner provided only minimal evidence at the hearing on May 12, 2004 with respect to this ground;
 - c. Based upon the evidence presented, as well as the evidence contained in the record in this matter, this Court finds that the petitioner has failed to provide support for this ground.

4. Failure to grant new trial based on state failing to prove the crime occurred in Putnam County.
 - a. A state right is being advanced by the petitioner;
 - b. The evidence contained in the trial transcript indicates that at least two (2) separate witnesses testified that the crime occurred in Putnam County. In particular Sergeant Charles Martin of the West Virginia State Police testified that the deceased's body was located "In Putnam County, approximately six miles out from 60 on a side road in a creek..."
 - c. Based upon the evidence presented, as well as the evidence contained in the record in this matter, this Court finds that the petitioner has failed to show that the State did not establish venue in Putnam County, West Virginia.

5. Insufficient evidence to support conviction of First Degree Murder.
 - a. A state right is being advanced by the petitioner;

- b. The petitioner has challenged the sufficiency of the evidence, and therefore takes on a heavy burden. The evidence must be viewed by this Court "in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury must have drawn in favor of the prosecution." (Syl. Pt. 6, *State v. McCracken*, 624 S.E.2d 537 (W.Va. 2005);
 - c. Based upon the evidence presented during these proceedings, as well as the entire record in this matter, this Court does find that there is sufficient evidence from which the jury could have found the petitioner guilty beyond a reasonable doubt.
6. Failure of Court to make an analysis regarding missing, potentially exculpatory evidence from the Department of Public Safety.
- a. A state right is being advanced by the petitioner;
 - b. Other than the allegation contained in the Petition, the petitioner has failed to advance any evidence regarding any missing evidence from the Department of Public Safety;
 - c. The evidence that was missing were the handwritten notes of Sergeant Charles Martin, and Sergeant Martin testified at trial that he was unaware of the location of his notes;
 - d. The petitioner has failed to pursue this claim, and in any event has failed to show how the court's lack of analysis regarding the missing notes has prejudiced him.

e. Based upon the evidence presented during these proceedings, as well as the entire record in this matter, this Court finds that the petitioner has failed to show any prejudice with respect to the missing notes.

7. Failure to grant mistrial on basis that prosecution utilized the testimony of Kathy Cottrill.

- a. A state right is being advanced by the petitioner;
- b. The evidence adduced at the hearing on May 12, 2004 indicated that the State had provided the defendant with a list of potential witnesses, and that Kathy Cottrill was listed as a potential witness at trial;
- c. The evidence adduced at the hearing on May 12, 2004 indicated that counsel for the defendant/petitioner had been provided a copy of Ms. Cottrill's statement by the State, and had reviewed the same prior to her testifying at trial.
- d. Based upon the evidence presented during these proceedings, as well as the entire record in this matter, this Court finds that the petitioner has failed to show how he was prejudiced by the Court permitting Kathy Cottrill to testify at trial.

8. Improper jury instruction.

- a. A state right is being advanced by the petitioner;
- b. Other than the allegation contained in the Petition, the petitioner has failed to advance any evidence with respect to State's Instruction No. 2;

- c. This Court finds that when all the instructions to the jury are considered as a whole, they adequately advised the jury of the necessary elements for the offense charged;
- d. This Court further finds that any error in State's Instruction No. 2 was harmless in view of the other instructions given at trial.
- e. Based upon the evidence presented during these proceedings, as well as the entire record in this matter, this Court does not find that trial court committed an error with respect to the jury instructions that were read to the jury.

9. Cumulative effect of individual errors.

- a. A state right is being advanced by the petitioner;
- b. Based upon the evidence presented during these proceedings, as well as the entire record in this matter, this Court does not find that trial court committed any errors at trial, however, if any errors were committed at trial they were harmless.

It is therefore ORDERED that the petitioner's Petition for Writ of Habeas Corpus be DENIED for the reasons set forth above.

It is further ORDERED that the above-styled matter be dismissed and stricken from the active docket of this Court.

It is further ORDERED that a copy of this Order be sent to the following individual or entities. It is further ORDERED that any party with an objection to this Order shall notify the Court within five (5) judicial days of receipt of this Order.

Timothy J. LaFon, Esquire
CICCARELLI, DEL GIUDICE & LaFON
1219 Virginia Street East
Suite 100
Charleston, West Virginia 25301-2912

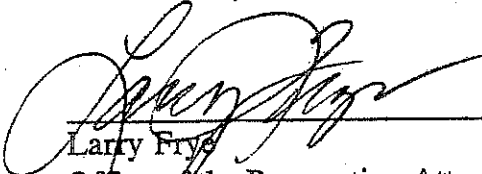
Putnam County Prosecuting Attorneys Office
Putnam County Judicial Building
Second Floor
3389 Winfield Road
Winfield, West Virginia 25213

ENTER:

June 19 2007


N. EDWARD EAGLOSKI, II, CHIEF JUDGE

Submitted By:

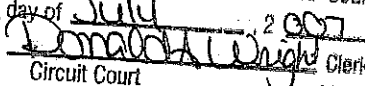

Larry Frye
Office of the Prosecuting Attorney
Putnam County Judicial Building
Second Floor
3389 Winfield Road
Winfield, West Virginia 25213
(304) 586-0205
West Virginia State Bar No. 5885

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SS:

I, Donald A. Wright, Clerk of the Circuit Court
of said County and in said State, do hereby certify
that the foregoing is a true copy from the records of
said Court.

Given under my hand and the seal of said Court

this 11 day of July, 2007


Donald A. Wright Clerk
Circuit Court
Putnam County, W. Va. MB