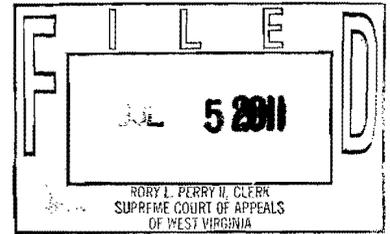


In the Supreme Court of Appeals

of

West Virginia

DOCKET NO. 11-0478



STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

vs.

Appeal from a final order of
Case No. 07-F-38
Boone County Circuit Court

JASON GILLISPIE, Defendant Below,
Petitioner

Appellant's Brief

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ASSIGNMENTS OF ERROR

I. THE TRIAL COURT COMMITTED ERROR, WHEN IT ALLOWED OVER OBJECTION, INTRODUCTION OF EVIDENCE OF A TEST OF A POOL STICK THAT WAS NOT SHOWN TO BE THE SAME OR SIMILAR TO THE ACTUAL POOL STICK USED IN THE COMMISSION OF THE OFFENSE.

II. THE TRIAL COURT COMMITTED ERROR WHEN IT REFUSED TO GRANT A MOTION FOR NEW TRIAL BASED ON JUROR MISCONDUCT. IT WAS DISCOVERED THAT THE JURY FOREMAN FAILED TO DISCLOSE TO THE LOWER COURT ON VOIR DIRE THAT HE HAD SIGNED A PETITION ASKING THAT APPELLANT BE DENIED PRE-TRIAL BAIL.

STATEMENT OF THE CASE

A. Introduction. A feud between Appellant and victim boiled over in Sterno's Bar on December 23, 2006. Appellant claimed he did not intend to kill the victim when he hit him with a pool stick, but the State disputed this contention. The State never found the pool stick in question but cut open another pool stick to show it was weighted with metal. There was no evidence that this characteristic was shared by the pool stick used by Appellant. The jury brought back a verdict of second degree murder signed by their foreman. It was later discovered that the same jury foreman had earlier signed a petition urging the court to deny Appellant pre-trial bond. When asked during jury selection if he had signed any such petition, the foreman made no response. Appellant claims he was denied a fair trial.

B. Defense Theory of Case. Appellant claimed at trial the events of December 23, 2006, were the result of several incidents constituting a pre-existing feud:

Roots of a pre-existing feud. Appellant Jason Gillispie met Rebecca McDerment at a bar called "Fire Bugs" in 2004. (Vol. II, T-6, p. 10). He did not know at that time Rebecca was married to Walter McDerment III, also known as "Lil Walter." (Vol. II, T-6, p. 12). Lil Walter is the son of the victim Walter McDerment II, also known as "Bubby McDerment," "Big Walter" or "Bubby." (Vol. II, T-6, pp. 15 to 16).

First Incident. Appellant learned that Rebecca McDerment was going through a divorce. (Vol. II, T-6, p. 13). Lil Walter confronted Appellant at Rebecca's trailer in Drawdy, West Virginia. (Vol. II, T-6, p. 13). When Appellant attempted to leave, Lil Walter gave chase and a confrontation took place at Fire Bugs. (Vol. II, T-6, p. 13). During the confrontation Lil Walter hit Appellant with a baseball bat. (Vol. II, T-6, p. 14). A second blow was blocked but Appellant's arm was broken in the process. (Vol. II, T-6, p. 14).

Second Incident. Two weeks later Appellant stopped at Fire Bugs to purchase cigarettes and was confronted by Bubby McDerment. (Vol. II, T-6, p. 15). Bubby McDerment threatened Appellant while holding a cue stick to

Appellant's throat. (Vol. II, T-6, p. 16).

Third Incident. A friend of Bubby McDerment, Ricky Castle, came to Sterno's Bar. (Vol. II, T-6, p. 18). Words were exchanged concerning the prior incidents involving the McDerments and a fight took place outside the Bar involving Appellant and Ricky Castle. (Vol. II, T-6, p. 18).

Events of December 23, 2006. On December 23, 2006, Appellant had been to a family gathering. (Vol. II, T-6, p. 23). He had been drinking most of the day. (Vol. II, T-6, p. 22). Later Appellant and his girlfriend went to Sterno's Bar. (Vol. II, T-6, p. 23). He saw Bubby McDerment outside the bar and a short discussion took place. (Vol. II, T-6, p. 27). McDerment was complaining that Lil Walter was ordered to pay \$4,000.00, restitution as a part of his plea to the battery on Appellant. (Vol. II, T-6, pp. 27 to 28). Bubby told Appellant that Appellant had "an ass whipping coming." (Vol. II, T-6, p. 28).

Later, inside the Bar, Bubby McDerment kicked the bar stool Appellant was sitting on and stared at him "straight in the eyes." (Vol. II, T-6, p. 28). Appellant stated to McDerment, "I don't want no problem with you," and McDerment walked off. (Vol. II, T-6, p. 29).

Appellant saw Bubby McDerment snorting lines of cocaine in the bathroom. (Vol. II, T-6, p. 29). Appellant began to shoot pool, trying to ignore

McDerment. (Vol. II, T-6, p. 29). But he could hear McDerment "slurring" him. By "slurring," Appellant was indicating that Bubby McDerment was making negative comments about him. (Vol. II, T-6, p. 30).

Appellant was in a compromised physical condition. (Vol. II, T-6, p. 20). In October of 2006, he had been in a serious automobile accident and had suffered severe injuries. (Vol. II, T-6, p. 24). He was afraid that he would have to fight Bubby. (Vol. II, T-6, p. 31).

Appellant testified he heard Bubby McDerment say: "When I finish this beer, I am going to whip this nigger's ass." (Vol. II, T-6, p. 30). Apparently, although a white male, Appellant's nickname in the area was "nigger." (Vol. II, T-5, p. 68). Appellant further testified that "he crushed his can of beer, and swung around in his chair, and I hit him with a pool stick." (Vol. II, T-6, p. 30). Appellant admitted hitting victim a second time. (Vol. II, T-6, p. 64).

Appellant stated he had no intention to kill Bubby and felt that Bubby would come out and fight him in the parking lot. (Vol. II, T-6, p. 32). Appellant did not realize that McDerment was hurt badly. (Vol. II, T-6, p. 31). He did not think he had hit him that hard. (Vol. II, T-6, p. 31).

Later, Appellant's brother came out to Sterno's parking lot and told Appellant "to get the hell out of here." (Vol. II, T-6, p. 32). Appellant drove to his

mother's house. (Vol. II, T-6, p. 32). Calls were received at his mother's home that McDerment was badly hurt and then later that he had died. (Vol. II, T-6, p. 33). Appellant called 911 and asked if the police were looking for him. (Vol. II, T-6, p. 33). The police arrived five minutes later. (Vol. II, T-6, p. 33).

C. State's Theory and their Witnesses. James R. Mooney, Patricia Mooney and Bubby McDerment began the evening of December 23, 2006, at Fire Bugs. (Vol. II, T-3, pp. 121 to 122). They were shooting pool when the owner of the bar decided to close early. (Vol. II, T-3, p. 122). They decided to go to Sterno's Bar. (Vol. II, T-3, p. 122).

Mooney testified that he did not see Bubby McDerment bump into or talk to Appellant Jason Gillispie. (Vol. II, T-3, p. 126). The group sat at an open booth. (Vol. II, T-3, p. 127). Mooney did not notice Gillispie and there were no conversations between Gillispie and anyone in their party. (Vol. II, T-3, p. 127).

Mooney describes the incident in question as follows:

... We were just sitting there talking and the jukebox was blaring, he was on one side of the table and I was on the other, it was kind of hard to hear, we were leaning forward across the table at each other ...

Mooney continues:

... all of a sudden, right out of the blue, Bubby got hit with a pool stick and he began to slouch over and he got hit again ... (Vol. II, T-3, p. 132).

Mooney did not mention any drug usage. The autopsy, however, showed that McDerment had cocaine in his system. (Vol. II, T-5, p. 64).

Another State's witness was David Jeffers. (Vol. II, T-3, pp. 14 to 54). He was not previously acquainted with either the victim or Appellant. (Vol. II, T-3, pp. 26 to 27). He was from Huntington and was present to help his wife put on a karaoke performance at Sterno's Bar. (Vol. II, T-3, p. 15). He testified that he did not see any trouble coming that night. (Vol. II, T-3, p. 28). He only noticed some people playing pool becoming louder. (Vol. II, T-3, pp. 28 to 29).

Jeffers did notice Gillispie because he was wearing a bright shirt. (Vol. II, T-3, p. 28). He did not pay particular attention to him because he, Jeffers, was keeping an eye on their karaoke equipment that was spread around the bar. (Vol. II, T-3, p. 29). He noticed Appellant turn the stick over and turn back to swing. (Vol. II, T-3, p. 33). He said Appellant swung a second time equally as hard. (Vol. II, T-3, p. 34).

D. Relevant Procedural History. After Appellant's arrest on December 24, 2006, several petitions were circulated and sent to the court urging that bond be denied. (Vol. I, AR 17). (Note -- Petitions are located in the Circuit Court file. Because the petitions are numerous and have little relevance to the appendix except for their bulk in terms of size and number, they were not reproduced.) A

large number of signatures were obtained. (Vol. I, AR 15 and AR 41). One such petition read in pertinent part:

... We the undersigned citizens of Boone County respectively request that Jason Gillispie not be granted bond in the case of the death of Walter Paul "Bubby" McDerment ... (Vol. I, AR 21).

This particular petition was relevant because it was signed by Robert L. Burke, SHL, 1078 Railroad Ave., Boone - Racine. Motion for new trial (Vol. I, AR 21 and AR 6). Mr. Burke later became the jury foreman. (Vol. I, AR 8).

Appellant was indicted on April 18, 2007, and charged with first degree murder. (Vol. I, AR 27). A pretrial hearing was held on February 7, 2008. The court discussed the issues of the petitions (Vol. I, AR 41 to 42) and the testing of a pool stick. (Vol. I, AR 45 to 47). Defense counsel objected at trial to the admission of the test of a pool stick that was not shown to be the pool stick used by Appellant. (Vol. II, T-2, pp. 18 to 19). A jury trial began February 12, 2008, and concluded on February 22, 2008. (Vol. I, AR 9). Appellant was convicted of second degree murder (Vol. I, AR 8), and sentenced on April 16, 2008, to twenty-five (25) years with credit for time served. (Vol. I, AR 12).

Less than a year after the imposition of his sentence, Appellant wrote a letter to the court advising that he wished a hearing on the issue of the jury foreman having signed a pre-trial petition against him. (Vol. I, AR 15). Appellant

also complained that his counsel was not communicating with him. (Vol. I, AR 15).

A motion for new trial based upon juror misconduct was filed in October, 2010. (Vol. I, AR 17). A hearing was held on the motion on December 2, 2010. (Vol. I, AR 25). The motion was denied. (Vol. I, AR 25). An Amended Order sentencing Appellant and setting forth the court's rulings of December 2, 2010, was filed March 1, 2011. (Vol. I, AR 25).

SUMMARY OF ARGUMENT

In this case the lower court abused its discretion in admitting a pool stick into evidence over objection. The pool stick was not shown to have been used in the commission of the alleged offense. The pool stick was tested by cutting it open to show it had a piece of metal inside. No expert testified concerning how pool sticks are made and no showing was made to suggest the pool stick tested was similar to the one used in the commission of the alleged offense. Appellant contends that the State failed to lay a proper foundation and that the admission of the pool stick was misleading and confusing.

Appellant also contends that the lower court abused its discretion and erroneously applied the ordinary diligence standard in a juror misconduct issue. Appellant found out after trial that the jury foreman had signed a pre-trial

petition urging the lower court to deny him pre-trial bond. The jury foreman was asked three times during voir dire concerning the pre-trial petitions but did not answer. The lower court ruled that because the matter concerning juror disqualification was not presented at jury selection, Appellant was not entitled to relief. The ruling implied that defense counsel had not employed ordinary diligence to ascertain the disqualification by searching through all of the pre-trial petitions. Case law cited suggests that ordinary diligence refers to asking and following up on questions during voir dire. That counsel can rely on voir dire to ascertain the truth of juror qualifications and that ordinary diligence does not extend to extrinsic investigations concerning jurors.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellant submits that the arguments in this case are straight forward, the facts of the case are not complicated and that the criteria of subsection (a) Rule 19, of the *Rev. R.A.P.*, are applicable.

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR, WHEN IT ALLOWED OVER OBJECTION, INTRODUCTION OF EVIDENCE OF A TEST OF A POOL STICK THAT WAS NOT SHOWN TO BE THE SAME OR SIMILAR TO THE ACTUAL POOL STICK USED IN THE COMMISSION OF THE OFFENSE.

A. How Presented in the Court Below. During pretrial motions on February 7, 2008, the prosecuting attorney advised the trial court that he intended to introduce a pool stick cut in half “at the butt end.” (Vol. I, AR 46). The prosecutor stated he wished to forestall a potential juror asking: “My God if he hit him that hard, why didn’t the pool stick break?” (Vol. I, AR 46). The prosecutor then stated he did not want to call an expert witness on the issue of how pool sticks are made. (Vol. I, AR 46). He proposed instead to cut the end off of the pool stick to show that it is a piece of metal wrapped in wood. (Vol. I, AR 46).

It is important to note that no notice was given that this issue was to be addressed at the pretrial conference. Essentially, the pretrial conference appeared to be an informal discussion. There is no order or stipulation of record that reflects any ruling or agreement as to the admissibility of the proposed pool stick exhibit discussed. It was noted by the prosecuting attorney that the State did not know which one out of approximately nine pool sticks was used in the

striking of the victim. (Vol. I, AR 45). The colloquy is somewhat confused and proceeds as follows:

Mr. Bazzle: I didn't want to go destroy or alter one of the sticks and then them say, heck, this might have been the murder weapon that you cut in half. Use one of the nine?

Mr. Curnutte: I don't care.

The Court: Fair enough. Use one of the nine. I think it's a demonstrative aid.
(Vol. I, AR 47).

By the time the trial was underway; trial counsel became more focused on the issue and clearly objected. (Vol. II, T-5, p. 18). First, the State admitted that it did not know which of several cue sticks was used in the offense. (Vol. II, T-5, p. 13). Second, the State admitted that there had been nine pool sticks but that only seven that were in the rack were seized. (Vol. II, T-5, pp. 14 to 15, and p. 17). Third, the State indicated that it selected a pool stick for testing and had performed a test on that pool stick. (Vol. II, T-5, p. 18). (Note -- The pool stick or pool sticks are referred to also as pool cue or pool cues at times.) The following question and objection then followed:

Q. (by Mr. Bazzle): What did you do with this particular stick?

A. (by Chief Deputy Larry Greene): I was requested by your office to have this stick cut in such a way that it would expose any weight that was inside of it.

Mr. Curnutte: I object to this line of testimony. This individual is not an expert on pool cues. I don't know the purpose of this. He doesn't even know if this is the actual pool cue.

Mr. Bazzle: First of all, we discussed this before, and it's to show what's on the inside of the pool cue.

Mr. Curnutte: Again, there is no - there is no evidence of any of these - they may - the pool cue that was used may be in there, but this witness has testified that he has hearsay testimony from Carolyn Weaver that these - she thinks there are - it's among these, but she doesn't know. She doesn't know - I mean, I see no purpose in this.

The Court: Mr. Bazzle?

Mr. Bazzle: The purpose is to show the inside of the pool stick. It's not just wood, that there's lead as to the heft and the weight.

Mr. Curnutte: Some pool sticks. We don't know if it was the pool stick that was actually used.

The Court: I'm going to allow it. All you're asking him to do is - it looks like the cue stick has been cut in half?

Mr. Bazzle: Yes, sir; and show him what's on the inside.

The Court: Sounds like a good argument for closing, Mr. Curnutte.

Mr. Curnutte: Note my objection.

(Vol. II, T-2, pp. 18 to 19).

B. Standard of Review. "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled*

on other grounds; *State ex rel. R.L. v. Bedell*, 192 W.Va. 43, 511 S.E.2d 469 (1994); Syllabus Point 1, *State v. Calloway*, 207 W.Va. 43, 528 S.E.2d 490 (1999).

C. *Factual Basis for Error.* Victim was killed by two blows from a pool stick. Statement of Case, this brief at pp. 4 to 6. The testing in the present case consisted of taking a pool stick apart by cutting it to explain its interior physical properties. (Vol. I, AR 46). No chain of custody was established to show that the tested pool stick was the same pool stick used by Appellant. (Vol. II, T-5, pp. 13 to 18). It was admitted by the State that they did not know that this was the actual pool stick used against the victim. (Vol. II, T-5, pp. 13 to 18 and p. 19). The Chief Deputy was not qualified as an expert on how pool sticks in general are manufactured. (Vol. II, T-5, p. 22). There was no evidence that the pool stick tested was similar to the one used by Appellant. The State only attempted to establish that the tested pool stick was the lightest of the pool sticks seized by the police from the pool stick rack. (Vol. II, T-5, p. 19). Two pool sticks that were not in the rack, but at the bar, were not seized and taken into evidence. (Vol. II, T-5, p. 17). The State made repeated reference in its closing to Appellant using "a deadly weapon" referring to the pool stick. (Vol. II, T-7, pp. 37, 64 and 67).

D. *Points of Law and Argument.* The word "Test" is defined by *Black's Law Dictionary* as: "To ... ascertain the truth of the quality or fitness of a thing.

Something by which to ascertain the truth respecting another thing; a criterion, gauge, standard, or norm." *Black's Law Dictionary*, Fifth Edition, p. 1321, (West, 1979). In the present case the State admittedly wanted to show pool sticks are weighted with metal (Vol. I, AR 46), are metal wrapped with wood (Vol. I, AR 46), are not such as to break if used with force against a person (Vol. I, AR 46) and therefore, a dangerous weapon. (Vol. II, T-7, pp. 37, 64 and 67).

Appellant asserts that when the State cannot show a chain of custody, it must at least resort to an expert witness to explain the physical properties of the manufacture of pool sticks. Otherwise, the evidence is not sufficiently accurate to allow the jury to assume that the pool stick used in the offense shares the same physical properties with the pool stick tested.

Justice Cleckley notes in his treatise on evidence:

Tangible objects make particularly potent items of evidence because they provide the jury with first-hand impression and immediacy that oral testimony can rarely duplicate. The potency of demonstrative evidence proves true the old adage that 'a picture is worth a thousand words.' Not only is the immediate impact of demonstrative evidence much stronger than oral testimony, but it also has a continued effect upon the jury because it may remain in the courtroom during the trial and may be taken to the jury room during deliberations.

1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, Sect. 4-3(F), p. 4-64 (4th ed. 2000).

The prosecutor proffered that the test on the pool stick would enlighten the jury on how much force was brought to bear on the victim by the Appellant. (Vol. I, AR 46). This is the key issue in the case because Appellant's defense was that he admitted hitting the victim with the pool stick, but he did not intend to kill the victim. Cases concerning tests require that any test be shown to have been conducted under similar conditions as those prevailing at the time and place of the occurrence under investigation. *E.g.*, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983); *Spurlin v. Nardo*, 145 W.Va. 408, 114 S.E.2d 913 (1960); *State v. Newman*, 101 W.Va. 356, 132 S.E. 728 (1926).

The State in the present case failed to show that the pool stick tested was similar to the pool stick used in the offense charged. The state failed to posit the operative question: Is the pool stick that is being presented as a demonstrative aid similar to all pool sticks, including the one that was used in the offense? Without this question being answered in the affirmative there was no predicate foundation laid for the presentation of the test result. Admission therefore is error.

Appellant further argues that the lower court abused its discretion in admitting evidence of this test because it was prejudicial under *W.Va. R. Evid.*, 403. The lower court noted at the pretrial conference that "a" pool

stick tested as proposed by the prosecutor could be a demonstrative aid. (Vol. I, AR 47). The lower court failed to consider during trial after proper objection, however, how such evidence could be misleading.

This Court upheld a ruling by the lower court in *State v. Knuckles*, 196 W.Va. 416, 473 S.E.2d 131 (1996), that it was proper to exclude evidence of normal liver functioning in excreting alcohol where testimony showed that the Defendant in that case was in a diabetic crisis and that his liver was not functioning normally. The evidence of normal function could not be shown to be similar to the abnormal liver function of a person in diabetic crisis and was therefore misleading. This Court went on to state, "... Indeed, the role of the trial court is to keep from the jury's eyes or ears evidence that may be misleading." *Knuckles*, 473 S.E.2d at 139.

Appellant contends that unless the State can demonstrate through expert evidence how pool sticks are made in general, the cutting open of a random pool stick results in confusion of the key issue of how "the" pool stick used in the commission of the crime was made. It is very likely that the jury, or a member thereof, was confused because the pool stick used in the commission of the offense "might" have been made in a fashion similar to the one tested.

Appellant therefore argues that the lower court abused its discretion in admitting the tested pool stick into evidence. Appellant further argues that the admission was prejudicial because it was used to counter his defense that he did not intend to kill victim.

II. THE TRIAL COURT COMMITTED ERROR WHEN IT REFUSED TO GRANT A MOTION FOR NEW TRIAL BASED ON JUROR MISCONDUCT. IT WAS DISCOVERED THAT THE JURY FOREMAN FAILED TO DISCLOSE TO THE LOWER COURT ON VOIR DIRE THAT HE HAD SIGNED A PETITION ASKING THAT APPELLANT BE DENIED PRE-TRIAL BAIL.

A. *How Presented in the Court Below.* As noted in the Statement of Case, in this brief at p. 7, a large number of signatures were placed on petitions urging the lower court to deny Appellant pre-trial bond. The lower court brought to the parties' attention at the pre-trial conference the issue of petitions. At the pre-trial conference the lower court stated on the record:

The Court: ... I know there's been a number of petitions signed in this involving a large number of people. Has anybody taken the time to see if there's any of the people on the petitions in the jury pool? ...

...

Mr. Curnutte [defense counsel]: I assumed we'd take that up during voir dire ...

The Court: That is something I want taken up at voir dire is the fact that there's these petitions. I don't really care if people talk about

the petitions, just ask if a petition was signed, because I think the petitions went both ways on this case.

...

(Vol. I, AR 41 to 42).

During voir dire, the lower court asked the prospective jury panel the following questions:

The Court: ... Now, a few months ago there was a couple of different petitions going around regarding this case ... Were any of you ever approached by anybody asking you to sign a petition regarding this case at all?

Nobody was? Nobody even approached you and said, 'Hey, I'm doing this?' Were any of you aware of these petitions?

So did any of you sign a petition? ...

(Vol. I, AR 50 to 51).

The record indicates that there were no affirmative responses to any of the above quoted questions. (Vol. I, AR 51). The juror in question, Robert Burke, was questioned later in chambers. (Vol. I, AR 54 to 62). It is apparent from the colloquy that he understood questions and was able to respond appropriately. Specifically, Mr. Burke had raised his hand in response to knowing certain police officers who were potential witnesses in the case. (Vol. I, AR 54 to 55). Mr. Burke clearly explained how he knew the officers and the manner that his previous complaints had been resolved by the police. (Vol. I, AR 55 to 58). Mr. Burke also clearly and succinctly explained his service in the Silver Haired Legislature. (Vol. I, AR 59 to 60). It is clear from the relevant documents in the record that

Mr. Burke went on to serve as jury foreman. (Vol. I, AR 8).

On April 12, 2009, Appellant brought to the lower court's attention that Mr. Robert Burke had failed to disclose that he signed one of the pre-trial petitions. (Vol. I, AR 15). Mr. Jack Hickok, previous appellate counsel (since retired), brought on a motion for new trial based upon juror misconduct. (Vol. I, AR 17). Mr. Burke was not called as a witness at that hearing. (Vol. II, M-8).

The hearing was held on this issue on December 2, 2010. (Vol. II, M-8). The lower court stated and ruled as follows:

I've reviewed the record. I've looked at the motion and specific portions of the record and, frankly, I don't know what I could have done at this trial. The Court was well aware of the petitions. The parties were well aware of the petitions. The Court itself asked of the jury, "were you aware; did you sign a petition?"

The Defendant had a copy of the petition and his counsel had a copy of the petition. And I'm aware how these so-called petitions work in the county. Sometimes these are put up at a convenience store and people start signing them without reading them.

I will say for the record, for what it's worth, if I would have known, if it were brought to my attention by Defense Counsel that he signed the petition I would have probably struck Mr. Burke. I feel this might be more grounds for habeas relief than a motion for a new trial.

I don't know what else the Trial Court could have done about it. I asked about it. I think both parties were aware of the petition and nothing was done in secret. In fact we discussed the number of people that had signed the petition and we thought about eliminating the entire community where most of the name came from. I believe there was some discussion on that on the record earlier.

I would have struck him if the motion was made, but the motion was not made. I'm going to go ahead and deny the motion now and I expect we'll see this issue on appeal and if that doesn't work we'll see it on a habeas shortly thereafter.

(Vol. II, M-8, pp. 7 to 8).

B. Standard of Review. "In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 1, *State v. Dellinger*, 225 W.Va. 736, 696 S.E.2d 38 (2010); Syl. Pt. 1, *Phares v. Brooks*, 214 W.Va. 442, 590 S.E.2d 370 (2003); and, Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

C. Factual Basis for Error. Please also refer to Statement of the Case, at pp. 6 to 9, for facts pertaining to this argument.

D. Points of Law and Argument. As noted in the cases cited in this argument *infra*, this Court has always been vigilant to protect the integrity of the jury system and particularly the right to an impartial jury. *West Virginia Code*, §62-3-3 requires a panel of twenty jurors "free from exception." The right to an impartial jury is guaranteed by the *United States Constitution*, Sixth Amendment.

The Due Process clause of the *Constitution of the United States*, Amendment XIV, imparts the guarantee to the States. This Court has said, "The right to trial by an impartial, objective jury is a fundamental right guaranteed by the Sixth and Fourteenth Amendments to *United States Constitution*, and Article III, Section 14 of the *West Virginia Constitution*." Syl. Pt. 2, *Dellinger*; and, Syl. Pt. 3, *State v. Varner*, 212 W.Va. 532, 575 S.E.2d 142 (2003).

W.Va. Code, Section 56-6-12 (1923) allows parties to inquire into any bias or prejudice a party may have to a matter and requires the court to call another juror if it appears a juror does not stand indifferent to the cause. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 173, 444 S.E.2d 47, 51 (1994); *Louk v. Haynes*, 159 W.Va. 482, 499, 223 S.E.2d 780, 791 (1976), *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942, 946 (1954). As this Court stated in *Dellinger*, "a criminal defendant is entitled to insist upon a jury composed of persons who have no interest in the case, have neither formed nor expressed any opinion, who are free from bias or prejudice, and stand indifferent in the case.'" *Dellinger*, 696 S.E.2d at 741.

In the present case the jury foreman had expressed a prior opinion about the case. He signed a petition requesting that Appellant not be granted pre-trial bond "in the case of the death of Walter Paul 'Bubby' McDerment" (Vol. I, AR 6). The lower court ruled that had that fact been known at voir dire, the juror, Robert Burke would have been struck. (Vol. II, M-8, p. 8). An inference of the lower court's ruling is that trial counsel for Appellant should have investigated and brought to the lower court's attention that fact in a timely fashion.

It is clear that a "party challenging a verdict based on the presence of a juror disqualified under *W.Va. Code*, Section 52-1-8(b)(6), must show ... ordinary diligence was exercised to ascertain the disqualification." *Proudfoot v. Dan's Marine Serv.*, 210 W.Va. 498, 558 S.E.2d 298, 305 (2001) (referring to statute pertaining to qualification of jurors, specifically regarding prior criminal convictions). Defense counsel also has an affirmative duty to inquire of a jury panel member to ascertain if they are qualified. *State v. Bongalis*, 180 W.Va. 584, 378 S.E.2d 449, 456 (1989) (failure of defense counsel to inquire of jury panel concerning prior felony conviction deemed waiver). And ask follow up questions to determine if any bias exists. *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331, 338 (1987).

The ordinary diligence required in *Proudfoot*, *Bongalis* and *Banjoman*, refers to asking questions during voir dire and not to other investigations outside of the voir dire process. Appellant argues that this is because the parties are entitled to rely on voir dire for purpose of eliciting “the truth” from jury panel members. *Michael v. Sabado*, 192 W.Va. 585, 453 S.E.2d 419, 426 (1994). And rely on the voir dire process itself to determine if there are any “relevant matters that might bear on possible disqualification of a juror.” *Human Rights Comm. v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 211 S.E.2d 349, 355 (1975).

In the case of *Williams v. Georgia*, 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed. 1161 (1955), the United States Supreme Court addressed post-trial relief in the context of juror bias issues. The Court quoted the following proposition concerning ordinary diligence: “Parties are not required to make searching investigation out of court to determine whether the jurors who are summoned are disqualified in their cases.” *Williams*, 349 U.S. at 385. It is interesting to note the underlying case cited and quoted is *Smith v. Georgia*, 2 Ga. App. 574, 59 S.E. 311 (1907), and involved the post-trial arson conviction contention that “one of the jurors was related to the deceased wife of the prosecutor within the ninth degree, and several of the prosecutor’s children continued the kinship by affinity.” *Williams*, 349 U.S. at 385. *Smith* is also cited with approval in *State v. Harris*, 69 W.Va. 244,

246, 71 S.E. 609 (1911) (dissenting opinion of Poffenbarger, Judge), which had affirmed a conviction for wrongful shooting because, despite a juror disqualification, there was no showing that defendant had suffered an injustice. The reasoning that a defendant must show injustice was first set forth in *Flesher v. Hale*, 22 W.Va. 44 (1883) and expressly overruled in Syl. Pt. 3, *Proudfoot v. Dan's Marine Serv.*, 210 W.Va. 498, 558 S.E.2d 298, 305 (2001).

Although to a certain extent each case must be decided on its individual facts on the point of what constitutes ordinary diligence, this court has not made reference to searching inquiries outside of court. It was never contended in *Dellinger* that defense counsel had an obligation to search all friends on the defendant's social network site and check against the jury panel members. And it was never suggested in *Proudfoot* that counsel was obliged to investigate outside of voir dire if any member of the jury panel had a prior conviction. Appellant suggests that this is because ordinary diligence pertains to the voir dire process itself and not to extrinsic investigations. The only exception to this is where the defendant or his counsel are aware of a fact and fail to timely disclose it at voir dire. See, e.g., *McGlone v. Superior Trucking Co.*, 178 W.Va. 659, 363 S.E.2d 736 (1987).

In the present case the discovery of the jury foreman's name on the pre-trial petition was made by the Appellant as reflected in his letter of April 12, 2009. (Vol. I, AR 15). In that letter, Appellant noted that there were approximately 1,200 names on the petitions. It is clear from the transcript that there were 40 persons listed as potential jurors. (Vol. I, AR 42). The names on the petitions were hand-written. The record at the pre-trial hearing shows that the lower court did not require counsel to make a search or comparison of names. (Vol. I, AR 41 to 42). The search or comparison was more of a suggestion. Defense counsel as noted above responded that he would rely on voir dire. The State's attorney indicated, "We'll go through them and do the best we can with them. That's about the best I can suggest on that." (Vol. I, AR 42). If this was actually done or attempted by the State, the effort bore no fruit as the State never inquired nor brought any matter to the lower court's attention pertaining to Mr. Burke's name on a petition at voir dire. (Vol. I, AR 54 to 62).

Appellant also argues that he did not delay bringing the matter to the lower court's attention for any tactical or improper motive. In fact, he alone has suffered the prejudice, if any, of delay. Sometimes due diligence does not reveal bias and prejudice at voir dire and the fault is not of any party to the trial but on a juror who fails to be forthcoming in his or her answer. The mere delay by lack

of knowledge of a fact does not foreclose a later objection. *See, e.g., State v. Vance*, 212 W.Va. 532, 575 S.E.2d 142, 147 (2002) (lower court abused discretion in finding motion untimely).

Another illustrative case on this point is *State v. Dean*, 134 W.Va. 257, 58 S.E.2d 860 (1950). In *Dean* the trial judge asked of the jury panel if “they had any bias in favor of or prejudice against members of the negro race.” *Dean*, 134 W.Va. at 274. The defendant was a young African-American woman charged with murder. After the trial, a juror who had negatively responded to voir dire questions concerning any bias or prejudice was heard to make extremely racist comments in a bar. *Dean*, 134 W.Va. at 272. The Court in *Dean* noted there was no lack of diligence on defense counsel because he correctly relied on the answer during voir dire that the juror was not bias or prejudice. *Dean*, 134 W.Va. at 274. It was not until after the trial that witnesses came forward and recounted racist statements made by the juror. *Dean*, 134 W.Va. at 270 to 272. The Court concluded that where the jury considered the questions of premeditation, deliberation and malice, “all dependence must rest upon the integrity and freedom from bias of the jury.” Therefore, even though there was otherwise sufficient evidence to convict, the Court was obliged to reverse, stating:

If a single member of that jury, notwithstanding the care of the trial court and the diligence of defendant’s counsel, entertained

such prejudice that he would be mentally unable to give defendant a fair trial, this defendant was not tried by twelve impartial jurors, who, from ancient times under our common law system of justice, which in these times typically American, is the protection of every citizen charged with crime, whether he be guilty or not.

Dean, 134 W.Va. at 274 to 275.

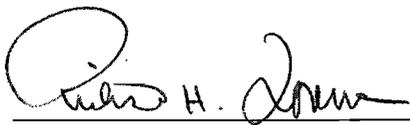
Appellant argues that he was denied a fair trial because the jury foreman signed a petition requesting that pre-trial bond be denied in his case, that the jury foreman failed to answer three voir dire questions directly relating to the signing of the petition, the jury foreman lead deliberations concerning guilt, innocence and degree of offence and signed the verdict convicting him of second degree murder in this case.

CONCLUSION

The conviction of the Appellant should be vacated and reversed and he should be granted a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2011, true and accurate copies of the foregoing **Appellant's Brief** and **Appendix Record** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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