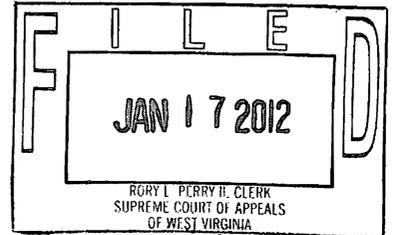


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL
COMPLEX

Petitioner,



v.

No. 11-0853

JOSEPH H. LAVIGNE, JR.

Respondent.

APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF PUTNAM COUNTY (99-C-223)

REPLY BRIEF OF THE PETITIONER
RESPONSE BRIEF REGARDING CROSS-ASSIGNMENT OF ERROR

Mark A. Sorsaia
(W.Va. I.D. #3516)
Prosecuting Attorney of Putnam County, West Virginia
Putnam County Judicial Building
3389 Winfield Road
Winfield, WV 25213
(304) 586-0205
Counsel for Petitioner

TABLE OF CONTENTS

I. Table of Authorities3

II. Argument3

III. Conclusion11

I. TABLE OF AUTHORITIES

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State v. Larry McFarland, ____ W.Va. ____, ____ S.E.2d ____ (W.Va.) 2011 WL 5902232
State v. Tracy L. Haid, ____ W.Va. ____, ____ S.E.2d ____ (W.Va.) 2011 WL 5902332
State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)
State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (W.Va. 1981)
State v. Padgett, 93 W.Va. 623, 628, 117 S.E.2d 493, 495 (W.Va. 1923)
State v. Moyer, 58 W.Va. 146, 52 S.E.2d 30 (W.Va. 1905)
State v. Riley, 201 W.Va. 708, 714, 500 S.E.2d 54 (W.Va. 1997)

Now comes the Petitioner by and through its Counsel, Mark A. Sorsaia, Prosecuting Attorney of Putnam County, West Virginia, to provide the following reply brief to arguments and legal analysis provided by the Respondent, as follows:

II. ARGUMENT

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY RULING THAT THE CONVICTION SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL BASED ON A FINDING OF INSUFFICIENT EVIDENCE.

It is interesting to note that the Respondent's Counsel makes the following statement, "the trial Court's comments is accurate because 'Joe' is actually innocent of this horrendous crime committed on his five year old daughter K.L.L." The Petitioner contends that many arguments have been provided by the Respondent and his Counsel and the Circuit Court to justify providing the Respondent with a new trial, that are inappropriate to consider when determining whether or not the Respondent should get a new trial. Arguably, the personal opinions of attorneys, or even personal opinions of a Circuit Judge, are not

appropriate to base a decision on providing the Respondent a new trial in a habeas corpus proceeding.

One prime example of this analysis is the Respondent's argument that there were several deficiencies in the police investigation in the case that quite possibly resulted in a failure to find the "real assailant". The Petitioner is not aware of any legal authority whatsoever to suggest that an alleged failed police investigation is grounds to provide a new trial for a person convicted of a crime. In the State of West Virginia a Grand Jury returns an indictment based upon evidence that is provided to them by the State, and petit juries return convictions based upon their evaluation of evidence that is provided to them by the State in a Court of law. Our juries must come to a conclusion that the State has proven the necessary elements of the case beyond a reasonable doubt. That is what happened in this case.

There has never been an official review in this habeas hearing or in the criminal trial for that matter, in which the State called witnesses to testify concerning the quality of the criminal investigation. Arguably, one would have to call experts in the field of law enforcement to review the criminal investigation to form a professional opinion whether or not there was a failure to adequately investigate a crime.

On November 23, 2011, this Honorable Court issued a per curiam decision in the case of State of W.Va. v. Larry McFarland, ____ W.Va. ____, ____ S.E.2d ____ (W.Va.), 2011 WL 5902232, in which this Honorable Court stated that the function of an appellate Court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus the relevant inquiry is whether, after reviewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime proven beyond a reasonable doubt.

The McFarland case also stated that a criminal defendant challenging the sufficiency of evidence to support a case takes on a heavy burden. An appellate Court must review all of the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save the guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not for an appellate Court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

This Honorable Court also on November 23, 2011, issued the per curiam decision of State of W.Va. v. Tracy L. Haid, ____ W.Va. ____, ____ S.E.2d ____ (W.Va.) 2011 WL 5902332. This case involved an allegation of sexual offenses relating to a fifteen year old victim. In this case the defendant/petitioner argued in support of a contention that there was insufficient evidence to support a guilty verdict. Again, this Honorable Court cited State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995) as the standard that should be used when dealing with an appellant's argument relating to an insufficient evidence claim. The facts of this case are very similar to the present matter, and this Honorable Court stated,

“the Petitioner's (Haid) arguments in support of his contention that there was insufficient evidence to support the guilty verdict consists of nothing more than a rehashing of his arguments to the jury. He submits that the testimony of the victim was unbelievable and incredible. He argues that there was no medical evidence in support of the accusations of sexual assault. He submits that the contradictions between his testimony and that of the victim were further evidence of her lack of credibility.”

In this case this Honorable Court made a finding that, “viewing the record in the light

most favorable to the State, we believe the Petitioner's arguments are wholly without merit."

After reviewing the Respondent's brief in this matter and the record provided to this Honorable Court, you will find that the Respondent's argument is nothing more than a rehashing of the arguments that could or would have been made to the jury in the underlying criminal trial. It does not matter what the personal opinion of the Respondent's Counsel is, and with all due respect it is not relevant what the personal opinion is of the Circuit Judge, a jury verdict should not be overturned based on an insufficient evidence argument unless there can be a finding that after reviewing the evidence in light most favorable to the prosecution, any rational trier of fact could not have found the essential elements of the crime proof beyond a reasonable doubt.

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE USE OF A JURY INSTRUCTION VIOLATED THE RESPONDENT'S CONSTITUTIONAL RIGHTS.

The Respondent's argument in their brief supports the Circuit Court's contention that the jury instruction was not appropriate because K.L.L.'s trial testimony in their opinion did not identify her assailant. Again, the Respondent also argued the alleged inconsistencies of the child's testimony in support for the proposition that she did not identify her father as the assailant in the Courtroom. In the recent case of State of W.Va. V. Tracy L. Haid, supra, this Honorable Court when dealing with the identical jury instruction stated, "Our review of whether the jury was properly instructed is deferential. We review the entire jury charge, not merely an isolated instruction, mindful that the entire charge must accurately reflect our law." The Petitioner argues that the legal analysis to determine whether or not a factual basis exists to justify a "State v. Beck"

instruction should also not just be limited to the testimony of the alleged victim in the case, but should also be mindful of the need to review the entire record of the case.

In State v. Haid, supra, the Court referred to State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (W.Va.1981). This Honorable Court stated that the defendant in Beck argued that in cases such as this where the prosecuting witnesses are immature and the charges arose in the context of a family dispute, there should be a requirement for some corroboration. This Honorable Court declined to require corroboration of the victim's allegation, holding that a conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, and credibility is a question for a jury.

Respondents have argued and the Circuit Court has found that there was not any forensic evidence of any kind to corroborate any statement from the child in this case (Lavigne) supporting the proposition that K.L.L.'s father was the assailant. The instruction complained of by the Respondent and the Circuit Court was a proper one to give to the jury in that it was important and necessary for the jury to be informed that the statements that K.L.L. had made, and her statements and actions during her testimony did not require any form of corroboration in order to obtain a conviction. It is important to remember that the State v. Beck instruction is used to inform the jury that in the State of West Virginia the allegations derived from the victim of a sexual assault are sufficient under proper circumstances to base a conviction in a Court of law and there is no requirement for outside corroboration.

The Circuit Court and the Respondent are grossly over simplifying the record in this case to suggest that the child did not provide the jury with a clear picture of who her

assailant was by her actions and testimony. As stated in the Petitioner's brief, the record is clear that based upon the child's testimony a jury could very well conclude that the child in many ways identified her father as the perpetrator of this crime. Most notable was the 911 tape where the Respondent himself was recorded saying in at least five instances that his daughter identified him as being the rapist. TT. Vol. 1, pages 185, 196, 187, 189, and 190. There was testimony from Dr. Phillips, Paramedic Stover, Emergency Service personnel. Dr. Kim Martin, and others, as well as the child's own mother, who all stated that the child had identified the father as the assailant. During the child's testimony she stated that she told her mother and father who had molested her, her father. TT. Vol. 1, page 254.

It is apparent from this legal debate that we are focusing on what is the definition of "testimony" in a criminal trial. The Respondent argues that the State v. Beck instruction should only be considered in relation to a factual vacuum that would only include the words that were uttered by the child witness in a Courtroom. The Petitioner would argue that the State v. Beck instruction should be provided based upon what a jury could conclude and derive from the victim's testimony in conjunction with the other evidence that they have heard in the trial. The Petitioner in his case argues that the testimony provided in this trial by others such as Dr. Phillips, Dr. Martin, the paramedics, emergency services personnel, the 911 tape, and other references to what the child had said in the past, in conjunction with the child's in-Court testimony provides a clear identification of the Respondent by the child as the perpetrator of the crime. This is obviously supported by the fact that a jury concluded beyond a reasonable doubt that the defendant was guilty of the crimes charged. To suggest that a jury would

not consider the other testimony that they heard in the trial when considering and interpreting the child's testimony defies any logic.

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THE TRIAL COURT'S DECISION TO LIMIT THE RESPONDENT TO FOUR CHARACTER WITNESSES DENIED THE RESPONDENT HIS CONSTITUTIONAL RIGHT TO PRODUCE EVIDENCE IN HIS DEFENSE.

The Respondent in his brief cites the cases of State v. Padgett, 93 W.Va. 623, 628, 117 S.E.2d 493, 495 (W.Va. 1923) and State v. Moyer, 58 W.Va. 146, 52 S.E.2d 30 (W.Va. 1905). The Petitioner would contend that the Rules of Evidence that have been adopted by the State of West Virginia and the case authority cited by the Petitioner post dates the Respondent's case law. The Respondent's two cases cited are 1905 and 1923. The Respondent went on to argue that the character of the defendant is one of the main facts at issue and of the utmost importance as it may have itself generated in the minds of the jury a reasonable doubt of the defendant's guilt. This argument begs the question of what real impact character evidence has in a criminal trial and specifically one dealing with the sexual assault of a child.

The Respondent argues that the character witnesses he was allowed to call only consumed thirty pages of a trial transcript of over one thousand pages, less than three percent of the total trial. The Respondent states, "This stingy restriction of 'Joe's character evidence' which was so critical to his defense was arbitrary, unreasonable and an abuse of discretion." The Respondent goes on to state that contrary to the State's argument, this is not a situation where the Court is being asked to second guess

the trial Court as to the number of character witnesses to be allowed in a given situation. The Respondent goes on to argue each case must be considered on its particular circumstances, and the real issue is whether the trial Court in this case unreasonably interfered with the defendant's right to present a defense by limiting character witnesses to four.

If the argument by the Respondent is true that each case must be considered on its own particular circumstances, then how is it possible for this Honorable Court to give any kind of objective guidance to our trial Courts concerning this issue by making a ruling that the trial Judge in this case abused his discretion by only allowing four character witnesses. Is the Respondent asking this Honorable Court to create a procedure in which our trial Judges would be required to do a mathematical calculation that the desired amount of character evidence proposed by a defendant should be in excess of three percent of the total testimony offered in a trial, as is suggested in the Respondent's brief.

The State/Petitioner in its brief stated that if this Circuit Court ruling only allowing four character witnesses is an abuse of discretion, it would put pressure on trial Judges in the future to start second guessing what is the extent of their discretion under Rule 403. As a practical matter would this Honorable Court be able to come up with some objective standards in which trial Judges would have guidance on what their limits of discretion are concerning character witnesses, and how could that analysis be structured. West Virginia law is clear even if this Honorable Court would disagree with the trial Judge's decision to allow only four character witnesses, there must be a finding of an abuse of discretion. State v. Riley, 201 W.Va. 708, 714, 500 S.E.2d 524 (W.Va.

1997) The evidence In this case is clear that the Respondent can not make a viable argument that the trial Judge abused his discretion by allowing four character witnesses to testify on behalf of the defendant.

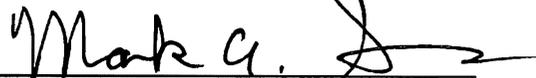
III. CONCLUSION

In State v. Guthrie, supra, this Honorable Court stated that an appellate review is not a device for a public Court to replace any findings with its own conclusions, and as an appellate Court should not decide credibility of a witness. After reviewing the Petitioner's brief, the Respondent's brief, and this reply, one would find that the essence of this matter is based upon the Circuit Court's decision to replace the findings of a jury with its own conclusions. The argument that the Respondent should be entitled to a new trial based on the insufficiency of evidence is based upon a conclusion by the reviewing Circuit Court and Respondents that the jury's decision in the criminal trial is wrong. In order to justify this position the Circuit Court went to great lengths by declaring that it was going to ignore certain parts of the trial transcript such as when the Court Reporter made a record of the child pointing at the defendant during the trial and looking at the defendant during the trial, and by not considering the significant amount of evidence provided by the State as to the child's prior identification of the defendant. The Circuit Court completely ignored the evidence in which the Respondent's wife had pressured and intimidated the child victim from disclosing the identity of the assailant. The Court refused to consider the idea of a jury after seeing the whole picture as provided through the complete trial, could come to the conclusion that the child's behavior on the stand was not only understandable but predictable, and in its own way

circumstantial evidence pointing towards the guilt of the Respondent. The Circuit Court's interpretation of the evidence also is used to support the contention that the jury instruction should not have been given, again based upon the idea that the child did not identify the Respondent during the criminal trial. The Respondent is also attempting to justify this decision based upon the subjective analysis that the trial Judge abused his discretion when only allowing four character witnesses to testify, and making other arguments such as a lack of a competent criminal investigation. By allowing this ruling to stand, a precedent is established in which Circuit Courts can substitute their own personal opinions over that of legitimate jury findings in violation of the principles established in State v. Guthrie. This would create an environment where there is no finality to criminal litigation and usurps the legitimate purposes of habeas corpus litigation.

Respectfully submitted,

Thomas McBride, Warden, Mount Olive
Correctional Complex, Petitioner

By: 

Mark A. Sorsaia
(W.Va. I.D. #3516
Prosecuting Attorney
Putnam County, West Virginia
Putnam County Judicial Building
3389 Winfield Road
Winfield, WV 25213
(304) 586-0205
Counsel for Petitioner

PETITIONER’S BRIEF REGARDING CROSS-ASSIGNMENT OF ERROR

TABLE OF CONTENTS

I. Table of Authorities13
II. Statement of the Case13
III. Summary of Argument.....14
IV. Statement Regarding Oral Argument.....14
V. Argument.....14
VI. Conclusion.....16

I. TABLE OF AUTHORITIES

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of W.Va. V. Robert Daggett, 167 W.Va. 411, 280 S.E.2d 545 (W.Va. 1981)

WEST VIRGINIA STATUTES

West Virginia Code 53-4a-7(c)

II. STATEMENT OF THE CASE

The Respondent has filed a cross-assignment of error arguing that the Circuit Court did not address or decide constitutional issue claims properly raised by the Respondent in the habeas corpus proceeding. The Respondent claims the lower Court erred in failing to decide the above claims.

III. SUMMARY OF ARGUMENT

The Circuit Court of Putnam County did address the claims raised by Mr. Lavigne in the habeas proceeding below.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary concerning the Petitioner's claims and therefore the Petitioner contends that oral argument can also address the following issues contained in the Respondent's cross-assignment of error.

V. ARGUMENT

The Respondent claims that the Circuit Court failed to make specific findings of fact and conclusions of law regarding two issues raised by Counsel. The first dealing with the trial Court permitting the testimony of K.L.L., an alleged incompetent witness, and an allegation that the State presented false testimony.

The Petitioner agrees with the Respondent that West Virginia Code, Chapter 53, Article 4A, Section 7(c), requires a Circuit Court denying or granting relief in a habeas corpus petition to make specific findings of fact and conclusions of law relating to each contention advanced by the Petitioner and to state the grounds upon which the matter was determined.

The Circuit Court did address the issues raised by the Respondent in its final order. The Circuit Court recognized the allegation of the trial Court permitting K.L.L. an alleged incompetent witness to testify as an issue. (A.R. Vol. 1, 30) The Circuit Court also acknowledged in its order the allegation that the State used false testimony as alleged in the Petition. (A.R. Vol. 1, 30)

Apparently, the Circuit Court chose not to make conclusions of law regarding this issue in light of the Court's decision to enter an order vacating the conviction and granting the Respondent a new trial on other grounds.

The record in this case will clearly show that the two issues raised by the Respondent concerning the alleged competency of K.L.L. to testify, and the alleged false testimony, has been well briefed and argued in the record. In the document titled the Respondent's post-evidentiary hearing and proposed findings of fact and conclusions of law in opposition to the second amended petition, the State of West Virginia addressed the issue of the competency of K.L.L. to testify (A.R. Vol. 1, 100). The State argued the proposition that the trial Court was correct by allowing the child to testify and that issue should not be second guessed by the Circuit Court. State of W.Va. V. Robert Daggett, 167 W.Va. 411, 280 S.E.2d 545 (W.Va. 1981) is one of the leading cases in our State dealing with the question of competency of a child to testify in a court of law. In that case this Honorable Court stated,

"The question of competency of a child as a witness in any case is always addressed to the sound discretion of the trial Judge, and if it appears a careful examination as to the age, intelligence, capacity and moral accountability has been made by the Judge and Counsel, the trial Judge has concluded that he is competent, the appellate Court will not reverse the ruling which permits evidence to be introduced unless it is apparent that it is flagrantly wrong."

The issue regarding false testimony was properly briefed by the State in the habeas corpus case below (A.R. Vol. 1, 106). The State argued below that basically the defendant Lavigne was claiming that he was entitled to a new trial based upon the rules of newly discovered evidence. The State contended that the defendant Lavigne would not be entitled to relief in that he could not prove the elements necessary to justify a new trial based on newly discovered evidence. (A.R. Vol. 1, 107, 108)

The position of the defendant Lavigne regarding these issues was placed in the record through Counsel's post-evidentiary hearing memorandum of law in support of the second amended petition. (A.R. Vol. 1, 116) Specifically, the argument concerning the right of confrontation, due process, and effective assistance of Counsel pertaining to the testimony of K.L.L., an alleged incompetent witness was briefed by defendant Lavigne's Counsel in the record. (A.R. Vol. 1, 128). The defendant Lavigne's Counsel also briefed the issue of the allegation of false testimony before Circuit Court. (A.R. Vol. 1, 137)

If this Honorable Court would review the transcript in this matter relating to the State's arguments and proposed findings of fact and conclusions of law and defendant Lavigne's arguments in the record as cited previously, it would find that these claims on the part of Mr. Lavigne had no merit and would not have been grounds for vacating the conviction and providing Mr. Lavigne with a new trial.

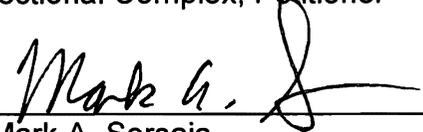
VI. CONCLUSION

The Petitioner concedes that there is a valid argument that the Circuit Court should have made findings of fact and conclusions of law on all issues as specified by the Code pursuant to West Virginia Code, Chapter 53, Article 4A, Section 7(c). If this Honorable Court would review the record as cited above, this Court would find that the issues complained of by the Respondent have no valid merit and common sense would dictate that they were not determined by the Circuit Court as being worthy of discussion or grounds to provide a new trial. In light of those facts and record no practicable purpose would be served by remanding this case back to the Circuit Court for further proceedings. The Petitioner respectfully requests this Honorable Court to reverse the judgment of the Circuit Court pertaining to its decision to provide the Respondent with a new trial, and reinstate the

conviction.

Respectfully submitted,

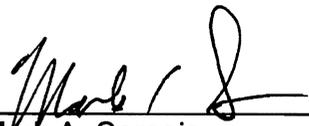
Thomas McBride, Warden, Mount Olive
Correctional Complex, Petitioner

By: 

Mark A. Sorsaia
(W.Va. I.D. #3516
Prosecuting Attorney
Putnam County, West Virginia
Putnam County Judicial Building
3389 Winfield Road
Winfield, WV 25213
(304) 586-0205
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Mark A. Sorsaia, Prosecuting Attorney of Putnam County, West Virginia, , do hereby certify that I have on this 13th day of January, 2012, served the within Reply Brief Of The Petitioner and Petitioner's Brief Regarding Cross-Assignment Of Error upon the within named Respondent by mailing a true copy thereof by regular United States Mail to his Attorney, Greg Ayers, Public Defender, at his last known address at the Kanawha County Public Defender's Office, Post Office Box 2827, Charleston, West Virginia.



Mark A. Sorsaia
(W.Va. I.D. #3516
Prosecuting Attorney
Putnam County, West Virginia
Putnam County Judicial Building
3389 Winfield Road
Winfield, WV 25213
(304) 586-0205
Counsel for Petitioner