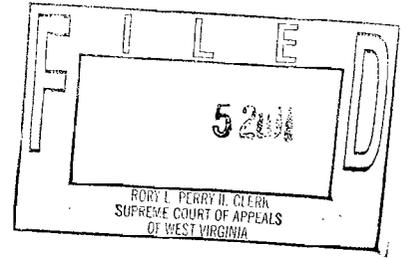


In the Supreme Court of Appeals
of
West Virginia

DOCKET NO. 11-0784



STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

v.

Appeal from a final order of
Case No. 09-F-50 & 10-M-1
Preston County Circuit Court

JOHN A HARTMAN, Defendant Below,
Petitioner

Appellant's Brief

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ASSIGNMENT OF ERROR

THE LOWER COURT COMMITTED ERROR IN GRANTING THE STATE'S MOTION TO JOIN A SEBSEQUENTLY FILED INFORMATION WITH A PREVIOUSLY RETURNED INDICTMENT WHERE THE BASIS FOR JOINDER WAS THAT THEY AROSE OUT OF A COMMON NEXUS OF FACT.

STATEMENT OF THE CASE

Appellant John Hartman arranged with his parents to visit his step-mother at the family home (Vol. II, JT 85) in Kingwood, West Virginia. (Vol. II, JT 161). He traveled from Fayette County and attempted to visit on August 9, 2009. (Vol. II, JT 161). Appellant's father, George Hartman, answered the door and advised that Appellant's step-mother had a headache and could not see him. (Vol. II, JT 162 to 163). Appellant agreed to return the following day at 3 pm. (Vol. II, JT 163).

Appellant returned the next day, Monday, August 10, 2009, at 3 pm. (Vol. II, JT 164). After knocking at the door, Appellant's father appeared and told him that his step-mother did not wish to see him. (Vol. II, JT 165). Appellant became angry and punched his father through the screen door. (Vol. II, JT 165). George Hartman fell backwards and hit his head. (Vol. II, JT 168). There was disputed evidence concerning further struggle. (Vol. II, JT *cf.* 168 to 172 with 120 to 122). There was evidence that Appellant placed a pillow under his father's head and left. (Vol. II, JT 172).

During the Monday “visit” from Appellant, Appellant’s step-mother, Eileen Hartman, was in the basement of the home doing laundry. (Vol. II, JT 78). When she heard the commotion upstairs, she immediately called 911 and stayed on the phone several minutes until police arrived on scene. (Vol. II, JT 78 to 80). She never saw Appellant. (Vol. II, JT 86). And Appellant never saw her. (Vol. II, JT 173).

Appellant was indicted on October 20, 2009, on two felony counts. (Vol. I, AR 5), and arraigned on October 26, 2009. (Vol. I, AR 3 line 8). The charges were Burglary and Malicious Assault on an Elder Person. (Vol. I, AR 5). The victim in both counts of the indictment was Appellant’s father, George Hartman. A notice was filed by the State on November 19, 2009, that it intended to introduce evidence that required an in camera pre-trial hearing. (Vol. I, AR 6). A pre-trial hearing was held on December 3, 2009, and the lower court ordered a forensic psychological/psychiatric evaluation of the Appellant. The in camera hearing was postponed to January 8, 2010. (Vol. I, AR 9) and (Vol. II, PT1 5).

During the pre-trial hearing on January 8, 2010, the State sought to file and consolidate a new charge by way of a misdemeanor information that arose out of the same factual transaction as the underlying indictment but involved another victim. (Vol. II, PT2 5). The victim in the misdemeanor information was Eileen Hartman. (Vol. I, AR 10). The charge was a single count of Domestic Assault. (Vol. I, AR 10). The basis for the charge was the violent assault of “...George Hartman within the hearing of Eileen Hartman...” (Vol. I, AR 10). The lower court allowed the consolidation of the

misdemeanor information over the objection of Appellant's Defense Counsel. (Vol. II, PT2 18 to 19) (Vol. I, AR 11). The State also presented evidence at the pretrial hearing of prior bad acts of the Appellant predicated in part on the filing of the misdemeanor information. (Vol. II, PT2 19). During the hearing Eileen Hartman testified concerning alleged facts from a Christmas tree being knocked over five years ago to recent phone calls. (Vol. II, PT2 21 to 36). The lower court ordered the State to file a more particularized statement regarding prior bad acts in the form of testimony of Eileen Hartman. (Vol. I, AR 12).

The State filed a supplement to its notice of intent to introduce evidence. (Vol. I, AR 14). The supplement covered allegations of bad acts from 1988 to the date of the offense of August 10, 2009. (Vol. I, AR 14 to 16). A further pre-trial hearing was held on January 27, 2010, and the lower court further considered the issue of prior bad act evidence in camera. (Vol. II, PT3 14 to 22). On the day prior to the start of the jury trial, the lower court entered an Order reflecting its ruling at the January 27, 2010, hearing. (Vol I, AR 18 to 19).

A jury was selected and the trial began in the underlying case on February 2, 2010. (Vol. I, AR 20 to 22). The witnesses at the trial were Eileen Hartman, George Hartman, Captain Daniel Holsinger of the Kingwood Police Department, and Appellant. (Vol. II, JT 2). The jury returned verdicts of guilty of Burglary, guilty of the lesser included misdemeanor offense of Battery of an Elder Person, a misdemeanor, and guilty of Domestic Assault. (Vol. I, AR 21).

A written motion for judgment of acquittal and/or new trial was filed by Defense Counsel on February 16, 2010, (Vol. I, AR 25), and a hearing was held on said motion prior to sentencing on April 2, 2010. (Vol. I, AR 26) (Vol. II, S).

The lower court sentenced Appellant to not less than one (1) nor more than fifteen (15) years on the Burglary conviction, one (1) year in the regional jail on the Battery of an Elder Person, to be served consecutively with the underlying felony, and, six (6) months on the Domestic Assault, to be served concurrently with the Battery of an Elder Person charge. (Vol. I, AR 27).

SUMMARY OF ARGUMENT

Appellant was indicted by the Preston County Grand Jury on two felonies. After the indictment, the State filed a misdemeanor information that arose from the same transaction but was not included in the indictment. The lower court erred in consolidating the misdemeanor information with the underlying indictment. In effect the consolidation is an amendment to the indictment. Appellant objected because the charge in the information was required to be presented and included in the indictment.

It is clear that the misdemeanor information was not based on later discovered evidence but was filed to gain an advantage in a motion to admit prior bad acts of the Appellant.

The historical function of the grand jury is to act as a shield against unfair and unwarranted prosecution. The grand jury cannot be used piecemeal and indictments

cannot be amended without resubmission to the grand jury.

Error in this case compromises the integrity of the grand jury proceedings and constitutes prejudice *per se*.

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

THE LOWER COURT COMMITTED ERROR IN GRANTING THE STATE'S MOTION TO JOIN A SEBSEQUENTLY FILED INFORMATION WITH A PREVIOUSLY RETURNED INDICTMENT WHERE THE BASIS FOR JOINDER WAS THAT THEY AROSE OUT OF A COMMON NEXUS OF FACT.

A. How Presented in the Court Below. A pre-trial hearing was held on January 8, 2010. (Vol. II, PT2). In that hearing the State's Attorney argues to the lower court that there is a need to address a misdemeanor information that the State wishes to file and its consolidation with the underlying indictment because it "has some direct bearing" upon the "admissibility of 404(b) information." The State's Attorney hands the lower court an unfiled information charging Appellant with the misdemeanor offense of domestic assault upon his step-mother Eileen Hartman. (Vol. II, PT2 5), (Vol. I, AR 10). The information states in pertinent part:

...[Appellant]... committed the misdemeanor criminal offense of 'Domestic Assault' by unlawfully committing an act that placed his family member, namely his step-mother, Eileen Hartman, in reasonable apprehension of immediately receiving a violent injury, to wit: violently assaulting George Hartman within the hearing of Eileen Hartman, after previously demanding but being denied the opportunity to speak with Eileen Hartman...

(Vol. I, AR 10).

The lower court requests of Defense Counsel if she has any objection and Defense Counsel states: "I do." (Vol. II, PT2 5). The objection is not to the filing of the information as the State can file such without leave of the court, but to the consolidation of the misdemeanor with the underlying felony. (Vol. II, PT2 6 to 7). She suggests the misdemeanor may be dismissed later on double jeopardy grounds. (Vol. II, PT2 14). Defense Counsel clarifies her objection by stating: "...[C]onsolidating a misdemeanor information that occurred as the same transaction, the same time, basically the same case is sidestepping the grand jury." (Vol. II, PT2 12). She argues the charge in the information could have been resubmitted to the grand jury along with the underlying charge. (Vol. II, PT2 14 to 16). Defense Counsel further argues that the State is not amending some minor detail of the indictment, but adding an "extra charge for which extra evidence must be introduced." (Vol. II, PT2 13). She argues the information constitutes a "substantial change" to the indictment. (Vol. II, PT2 13).

The State's Attorney argues in response that "...even though the state sometimes incorporate (sic) misdemeanor charges into ...indictments, we are certainly not obliged to..." (Vol. II, PT2 16). And continues the argument by asserting that discovery of the

offense of domestic battery of Eileen Hartman was after the indictment was returned. (Vol. II, PT2 17). The lower court inquires of State's Attorney: "You're saying this information wasn't known at the time the grand jury met...?" (Vol. II, PT2 17). State's Attorney responds: "It was not known to me... The evidence was there in the 911 call..." (Vol. II, PT2 17). (Note. See quoted Grand Jury testimony in "Factual Basis for Error" *infra*.)

The lower court observes prior to ruling: "Both the state and the defense have told me that these alleged events all grew out of the same act or transaction." (Vol. II, PT2 18).

In conclusion the lower court rules in its Pretrial Hearing Order as follows:

...After hearing the proffers and arguments of counsel, the Court found that the allegations in said Information involve the same course of conduct alleged in the Indictment in Case No. 09-F-50, that both matters involve the same witnesses, and that the Information has been timely filed with advance notice to the Defendant. Accordingly, it is hereby ORDERED that the *State's Motion for Leave to File Information and to Consolidate Cases* is GRANTED.

(Vol. 1, AR 11).

The lower court on the record noted that the consolidation issue was over the exception and objection of the defendant, and preserved the objection. (Vol. II, PT2 19).

B. Standard of Review. The standard of review is set forth in *State v. Haines*, 221 W.Va. 235, 238, 654 S.E.2d 359, 362 (2007): Where a case "...implicates the grand jury clause of section four of article III of the state constitution..." the review of the issue raised in the case is plenary; and, where the issue on appeal is based upon

“...interpretation of the *West Virginia Constitution*, along with interpretations of statutes and rules...” the primary question is one of law and the “*de novo* standard of review” applies. *Haines, supra*.

C. Factual Basis for Error. The issue is primarily legal concerning whether the indictment was in effect amended by the later filing of a misdemeanor information based upon the same act or transaction. The underlying facts are set forth above in “How Presented to the Court Below.” One further underlying fact is that the 911 call referred to by the State’s Attorney was a call made by Eileen Hartman on the day the underlying offense (subject of both felony and misdemeanor presentments). The call and the circumstances regarding the call were brought to the Grand Jury’s attention. (Vol. II, GJ 5).

Q. [State’s Attorney]: ...Why were you called there?

A. [Captain Daniel Holsinger] ...the wife called the 911 Center, and she was hiding in the basement.¹

(Vol. II, GJ 5).

D. Points of Law and Argument. “Pursuant to Rule 8(a) of the *West Virginia Rules of Criminal Procedure*, the burden of joining multiple offenses arising out of the same act or transaction ... is upon the State and not upon the defendant.” Syl. Pt. 4. *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996); “A defendant has a right under the Grand Jury Clause of Section 4 of Article III of the *West Virginia Constitution* to be tried only on felony offenses for which a grand jury has returned an indictment.” Syl. Pt. 1,

1. State’s Attorney asking question is the same person making argument to the lower court at the pre-trial conference and quoted above in, “How Presented to the Court Below.”)

State v. Haines, 221 W.Va. 235, 654 S.E.2d 359 (2007); “A defendant shall be charged in the same indictment, in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both ... are based on the same act or transaction ...” Syl. Pt. 8, *State ex rel. Games-Neely v. Sanders*, 211 W.Va. 297, 565 S.E.2d 419 (2002); “Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury ...” Syl. Pt. 5, *State v. Corra*, 223 W.Va. 573, 678 S.E.2d 306 (2009); and, Rule 7(e), West Virginia Rules of Criminal Procedure, “The court may permit an information to be amended at any time ... if no additional or different offense is charged.” See, e.g., *Haines*, 654 S.E.2d at 363, [Rule 7(e) can be applied to indictments.]; and, *State v. Adams*, 193 W.Va. 277, at 282, 456 S.E.2d 4, at 9 (1995).

1. *The State Knew or Should Have Known of the 911 Call*. This Court discussed the “countervailing policies” that may exist to avoid “draconian” requirements of joinder under Rule 8(a), West Virginia Rules of Criminal Procedure, in *State ex rel. Forbes*, 475 S.E.2d at 45. This Court rejected any broad application of such policies as suggested by *Gilkerson v. Lilly*, 169 W.Va. 412, 288 S.E.2d 164 (1982); and, *State v. Duskey*, 178 W.Va. 258, 358 S.E. 2d 819 (1987). The factual scenario in *State ex rel. Forbes*, involved not guilty verdicts on misdemeanor charges after a bar fight. Unhappy with that result the State’s Attorney then decided to charge the same individuals with felony assault offenses. The Court in *State ex rel. Forbes*, in molding a writ developed the standard that if the State Attorney *knew or should have known of facts arising out of the same transaction*, then joinder is mandatory. *State ex rel. Forbes*, 475 S.E.2d at 47.

In the present case the State obviously knew at the time of the grand jury presentment that there was a 911 call. This was discussed at the grand jury. Further, the investigating officer knew of the circumstances of Eileen Hartman in making the call and told State's Attorney those circumstances at the grand jury proceeding prior to the grand jury returning a true bill. At the pre-trial hearing it is apparent that Defense Counsel did not yet have the grand jury transcript. (Vol. II, PT2 17). State's Attorney represents to Defense Counsel and the Court: "The matters put forth in this information were not presented to the grand jury as the transcript will indicate when Ms. Collins gets it." (Vol. II, PT2 17). The lower court and Defense Counsel are dependent on the representations of State's Attorney as to what happened before the grand jury.

Consider the following representations of State's Attorney:

...The allegations against ...[Appellant]... in this information are concurrent with the acts of ...[Appellant]... with regard to George Hartman.

Specifically, Eileen Hartman was cowering in great fear in the home as a result of the actions and behaviors of ... [Appellant]...

So, these are really one and the same case. Just we have two different victims. So they need to be tried together.

...
(Vol. II, PT2 11).

Captain Daniel Holsinger states to the same State's Attorney at the grand jury:

"...the wife called the 911 Center, and she was hiding in the basement."
(Vol. II, GJ 5).

The same State's Attorney again argues to the lower court:

... [T]his is not something that we just presented to the grand jury and didn't get a true bill. It is not something that we neglected to put in. This

is information that was developed through continuing investigation. We believe that it is the same transaction. We believe that they do need to be tried together.

(Vol. II, PT2 17).

Appellant argues that the State's Attorney did have actual knowledge of the circumstances of Eileen Hartman prior to the return of a true bill. But even if he did not, the State must be held to a level of preparation prior to grand jury that would lead to considering all potential charges and victims. The 911 call on the day of the offense was a fact just as any other fact that happened that day. It certainly was not "information" hidden or otherwise secreted only to be "developed through continuing investigation."

2. The True Motivation to Amend the Grand Jury Indictment Was to Aid the State's Argument to Admit 404(b) Evidence. As noted in "How Presented in the Court Below," the State wanted to consider the filing and consolidation of the misdemeanor information before the lower court took up the Rule 404(b), West Virginia Rules of Evidence, issues. The full colloquy on this point follows:

...**THE COURT:** ...Next we have a motion that was filed by the state on or about November 20, 2009. This motion is captioned State's Notice of Intent to Introduce Evidence Which is Subject to In Camera Pre-Trial Hearing. We ready to proceed on that one?

MR. MEANS: Your Honor, I am; however, I believe that from the state's perspective it would be more appropriate to address the issue concerning the information and the consolidation of cases because it has some direct bearing upon what the state would perceive to be the admissibility of 404(b) information.

THE COURT: Do you have any objection, Ms. Collins?

MS. COLLINS: I do, your Honor....
(Vol. II, PT2 5).

Appellant argues that the State shows that its avoidance of presenting the entire case to the grand jury was a matter of post grand jury strategy as opposed to finding new evidence. The State's motivation in amending the grand jury indictment by presenting the information is further shown in the following statement. State's Attorney argues:

...[W]e must convince the jury that her apprehension of receiving an injury was reasonable under the circumstances.

Ms. Hartman has testified to what was in her mind at the time which included this history of violence that she is personally aware of.

...
(Vol. II, PT2 37).

The lower court struggles with how the additional charge presented by the misdemeanor information complicates the potential ruling with regard to Rule 404(b), West Virginia Rules of Evidence. The lower court states:

I'm afraid quite frankly - well, to be perfectly honest about this, I can't make the appropriate 404(b) analysis because you have just thrown out so much that I need to be very careful to specifically restrict or not restrict the evidence that you intend to introduce.
(Vol. II, PT2 43).

The lower court requires the State's Attorney to "file a more particular statement regarding the proposed testimony of Eileen Hartman..." (Vol. I, AR 12). The State later files a "Supplement to the State's Notice of Intent to Introduce Evidence." (Vol. I, AR 14). This document recounts every problem Eileen Hartman had with her step-son

[Appellant] from the time she married George Hartman in 1988 until the time of her alleged assault. (Vol. I, AR 14 to 15).

A later hearing is held on January 27, 2010, and Defense Counsel objects to the State's intended evidence of prior bad acts "just to try to show that Mrs. Hartman was reasonably afraid of ...[Appellant...]." (Vol. II, PT3 8). Defense Counsel argues that this intended use is very prejudicial with regard to the felony charges of Burglary and Malicious Assault on an Elder Person. (Vol. II, PT3 9).

The lower court in explaining its ruling carefully considers the intended use of the evidence and limits the evidence to events from April 19, 2009, until the day of the offense excluding two statements that are not intrinsic to the issue that existed between Appellant and Eileen Hartman. (Vol. II, PT3 14 to 21), (Vol. I, AR 18 to 19). The lower court preserves Appellant's objection. (Vol. II, PT3 21).

The case is now a completely different case than what was presented to the grand jury. A new and different charge has been added with a new victim. Additional evidence intrinsic to the issue that existed between Appellant and Eileen Harman is now admissible.

The case presented to the Preston County Grand Jury sitting at the October Term of Court 2009, was: Captain Holsinger receives a 911 call and responds to the scene of the Hartman residence. (Vol. II, GJ 5). He sees George Hartman, age 84, on the floor bleeding; the area surrounding him inside the house is in disarray. The officer talks to Mr. Hartman and relates the following information to the grand jury:

He told me that ...[Appellant]...had driven up to the residence and asked to see his stepmother and George advised him that the stepmother did not wish to speak to him at that time. She was not real well. And at that point he punched him through the screen.

(Vol. II, GJ 6).

There are two questions from the grand jury members. A grand juror asks: "So he beat up his own father because he couldn't talk to his stepmother?" And a second question from the Foreperson of the grand jury that is cut off by the State's Attorney: "The burglary part, what all was -" The question is cut off with the answer from the State's Attorney: "It is alleged that he entered the residence with the intent to commit the battery." (Vol. II, GJ 9).

Would the grand jury have voted to include a domestic assault charge because Eileen Hartman "heard" the assault upon George Hartman? Did they have enough evidence from the fact that the wife was hiding in the basement and calling 911 to have instructed the prosecutor to include a domestic assault charge in the indictment because she heard the assault on her husband? The State's Attorney does not feel he needs to resolve those issues with the grand jury. The State's Attorney apparently thinks that "...even though the state sometimes incorporate (sic) misdemeanor charges into ...indictments, we are certainly not obliged to..." (Vol. II, PT2 16).

3. *The Grand Jury is a Protective Body that Cannot Be Used Selectively. Once a Case is Submitted to it, the Entire Case Must be Submitted.* This Court discussed the historical purpose of the grand jury in *State ex rel. Miller v. Smith*, 168 W.Va. 745, 285 S.E.2d 500 (1980), noting the "grand jury is an integral part of our judicial system with ancient

origins." *Smith*, 285 S.E.2d at 502. The Court notes that the historical purpose of the grand jury in serving as both sword and shield is upheld by the *West Virginia Constitution*, Articles: Art. III, Section 20 and Art. IV, Section 5. "A valid indictment ... can only be made by a grand jury." *State ex rel. Starr v. Halbritter*, 183 W.Va. 350, 395 S.E.2d 773 (1990), (Syl. Pt. 1, in part). In *State ex rel. Starr*, the prosecutor presented evidence and provided grand jurors with memorandum forms and drafted indictments after deliberations. 395 S.E.2d at 774. The prosecutor added conspiracy charges and only the grand jury foreperson actually saw the text of the indictment for the purpose of signing the same. *Id.* This Court held in *State ex rel. Starr*, that only a grand jury can make an indictment and that indictment cannot be altered or amended by a prosecutor. Syl. Pt. 1, *State ex rel. Starr*.

Appellant argues that the integrity of the grand jury is equally compromised when the State seeks to add a new charge by way of a misdemeanor information that was required to be submitted to the grand jury. Although the means of adding to the indictment might vary from that employed in *State ex rel. Starr*, the end result is the same. The underlying charges improperly joined with a misdemeanor information not presented to the grand jury violate the historical and constitutional purpose of the grand jury as a shield against overzealous or unjust prosecution.

Appellant argues that the domestic assault charge was required to be presented along with the underlying felony charges pursuant to Rule 8(a) of the West Virginia Rules of Criminal Procedure. That allowing the later consolidation of the domestic

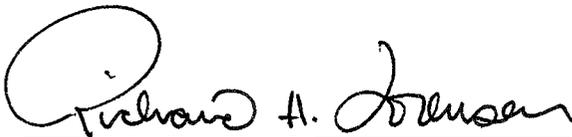
assault case with the underlying felony indictment was in effect amending the substance of the indictment returned by the grand jury. This is "...fundamental error so compromising the integrity of the grand jury proceedings as to constitute prejudice *per se*, and the indictment must be dismissed as void..." Syl. Pt. 2, *State ex rel. Starr v. Halbritter*, 183 W.Va. 350, 395 S.E.2d 773 (1990).

CONCLUSION

The remedy is to quash the indictment and information and require that the matter be resubmitted to the Preston County Grand Jury. *See, e.g., Syl. Pt. 2, State ex rel. Starr v. Halbritter*, 183 W.Va. 350, 395 S.E.2d 773 (1990).

Respectfully submitted,

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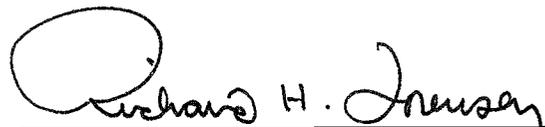
CERTIFICATE OF SERVICE

I, Richard H. Lorensen, appellate counsel of record for John A. Hartman hereby certify that on this **3rd** day of **August, 2011**, true and accurate copies of the foregoing **Appellant's Brief** and **Appendix** was deposited in the U.S. Mail contained in a postage-paid envelope addressed to all parties to this appeal as follows:

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