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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 12-015

JOSEPH FREDERICK HORN,
Petitioner

V.)

STATE OF WEST VIRGINIA,
Respondent

Appeal from a final order
of the Circuit Court of McDowell
County (10-F-08-M)

Petitioner's Brief

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF AQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE

2. WEST VIRGINIA CODE § 61-2-1 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES ARTICLE III,§ 10 OF THE WEST VIRGINIA CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS SAID STATUTE IS VOID FOR VAGUENESS

3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE OF WEST VIRGINIA TO PRESENT ILLEGALLY OBTAINED EVIDENCE IN ITS CASE-IN-CHIEF

4. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL

STATEMENT OF THE CASE

The Petitioner, Joseph Frederick Horn, was charged on the 16th day of June, 2009 with First Degree Murder and 4th Degree Arson. The victim, Michael A. Rife, of McDowell County was a friend of the petitioner, Joseph Frederick Horn. The murder occurred in an area of McDowell County commonly known as Peachpatch and bordering Buchanon County, Virginia. A preliminary hearing was held in the Magistrate Court of McDowell County, West Virginia on the 29th day of July, 2009. Mr. Horne and his appointed counsel waived the preliminary hearing on that date.

Mr. Horne was indicted by the February 2010 Term of the McDowell County Grand Jury. He was arraigned on this indictment on the 26th day of February, 2010. The defendant moved for additional counsel and on the 6th day of January, 2011 the undersigned counsel was appointed to assist the petitioner herein.

A jury trial was held in this matter by the lower court on December 6, 2011. After its deliberation the jury returned its verdicts of Guilty of Murder in the First

Degree with a recommendation of Mercy as contained in Count 1 of the indictment herein and Guilty of 1st Degree Arson as in Count 3 of said indictment. The lower court dismissed Count 2 charging First Degree Robbery on the defendant's motion.

A hearing was held regarding all post trial motions on the 15th day of February, 2012. The post trial motions were denied and the petitioner, Joseph Frederick Horn, was sentenced to life in prison regarding count 1 and sentenced to 5 years regarding count 2 by order entered on the 21st day of February, 2012. The Petitioner, Joseph Frederick Horn, believes he is entitled to a new trial due to reversible error made by the Circuit Court of McDowell County.

SUMMARY OF ARGUMENT

The lower court erred in allowing the State of West Virginia to present illegally obtained evidence in it's case in chief. The Honorable Rudolph Murensky, Chief Judge of McDowell County, West Virginia conducted a suppression hearing regarding illegally obtained evidence in this matter on the 6th day of June, 2011. The lower court failed to suppress illegally obtained evidence gathered by the Buchanon County, Virginia Sheriff's Department (i.e. pants, boots, underwear) of the petitioner. Mr. Horn was detained at a Virginia residence by the McDowell County Sheriff's Department while search warrants were obtained by Virginia police officers. The evidence was obtained illegally and was key in the prosecution of the petitioner, Joseph Frederick Horn.

The lower court also failed to suppress an illegally obtained statement given by the petitioner. This statement was given while being detained by the Buchanon County, Virginia Sheriff's Department. The statement was obtained illegally and was key in the prosecution of the petitioner.

The lower court erred in allowing the State of West Virginia to present previously suppressed evidence in it's case in chief. A suppression hearing was heard on the 6th day of June, 2011. At this hearing the lower court ruled that a knife recovered from the petitioner was suppressed. Nonetheless, the prosecuting attorney spoke of the knife and the possibility of blood on the knife in his direct examination of an official from the West Virginia State Crime Lab. Merely mentioning the knife was highly prejudicial to the petitioner because of the nature of this First Degree Murder case. The victim was stabbed multiple times resulting in his ultimate demise.

The lower court erred in denying the petitioner's motions for a judgment of aquittal. The State had the burden to prove beyond a reasonable doubt that the petitioner, Joseph Frederick Horn, murdered the victim Michael A. Rife and burned his mobile home on or about the 15th day of June, 2009 in McDowell County, West Virginia. The State merely proved the petitioner's participation was possible or plausible. The State produced no witnesses to the crimes herein nor did they recover any murder weapon or any evidence that would directly link the petitioner to the murder of Michael Rife or the arson of his real property. While the evidence need not exclude every reasonable hypothesis of innocence in order to sustain a guilty verdict, this verdict was predicated on conjecture. The State failed to meet its heavy burden of proof and the lower court should have set aside the verdict.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

1. Petitioner affirmatively states that the issues raised in assignments of error of the instant petition are issues of fundamental public importance, issues of first impression, and issues involving constitutional questions regarding the validity of a statute and may

be selected for oral argument pursuant to Rule 20 of the West Virginia Revised Rules of Appellate Procedure.

ARGUMENT

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF AQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE

The State simply did not present sufficient evidence to meet its burden of proof in proving all of the elements necessary to convict Petitioner Joseph Frederick Horn of the two (2) counts for which a verdict of guilty was rendered. The lower court wrongfully denied Petitioner's properly made motions for judgment of acquittal after the close of the State's case-in-chief and again at the close of all the evidence. *See* W. Va. R. Crim. P. 29. Rule 29 of the West Virginia Rules of Criminal Procedure allows for a Court, upon motion of a defendant or on its own motion, to order acquittal of one or more offenses charged in the indictment if the evidence is "insufficient to sustain a conviction of such offense or offenses."

> 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 Petitioner's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt."

Syl. Pt. 1. *State* v. *Longerbeam,* 226 W. Va. 535, 703 S.E.2d 307 (2010) *quoting State v. Guthrie,* 194 W. Va. 657,461 S.E.2d 163 (1995).

> A criminal Petitioner challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial in the light most favorable to the prosecution and must credit all inferences and reducibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can

> find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which a jury could find guilt beyond a reasonable doubt.

Syi. Pt. 3. *State v. Guthrie,* 194 W. Va. 657,461 S.E.2d 163 (1995).

> In a criminal case, a verdict of guilty will not be set aside on the ground that it is contrary to the evidence, where the State's evidence is sufficient to convince impartial minds of guilt of the Petitioner beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Syl. Pt. 1 *State v. Starkey,* 161 W.Va. 517,244 S.E.2d 219 (1979).

Petitioner recognizes the heavy burden associated with contesting sufficiency of evidence at trial, but Petitioner believes that his burden has been met as the State was unable to present sufficient evidence to establish every statutory element of West Virginia Code § 61-2-1 (Murder) and § 61-3-1 (Arson) for each count. Similar to the issues raised in *State* v. *Longerbeam,* 226 W. Va. 535, 703 S.E.2d 307 (2010), this case requires focused analysis on the specific elements of West Virginia Code § 61-2-1 and § 61-3-1.

The jury's verdict must be set aside and judgment of acquittal must be entered on counts 1 and 3 as the evidence submitted to the jury was insufficient to sustain a conviction for such offenses as the State failed to prove beyond a reasonable doubt all of the elements of the offenses for which Petitioner Joseph Frederick Horn was convicted.

a. The State failed to offer sufficient evidence to prove that Petitioner actually committed the acts that are the basis of the counts for which he was convicted

Petitioner Joseph Frederick Horn was acquitted on count 2 in the indictment which alleged that he committed robbery against the victim Michael A. Rife. The

petitioner was convicted on counts 1 and 3 under the same rationale he was acquitted on count 2. For purposes of analysis, the language of the counts contained in the indictment for which Petitioner Joseph Frederick Horn was convicted state as follows:

> **Count One.** Murder of the First Degree. That on or about the _____ day of June, 2009, in the said County of McDowell, JOSEPH FREDERICK HORN did feloniously, unlawfully, maliciously, willfully, deliberately and premeditatedly, kill, slay and murder one Michael A. Rife, in violation of West Virginia Code § 61-2-1, as amended, against the peace and dignity of the State.
>
> **Count Three.** First Degree Arson. That on or about the _____ day of June, 2009, in the said County of McDowell, JOSEPH FREDERICK HORN did unlawfully, intentionally, feloniously, willfully, and maliciously set fire to or burn a certain dwelling house belonging to Michael A. Rife, in violation of West Virginia Code § 61-3-1, as amended, against the peace and dignity of the State.

The State presented absolutely no evidence at trial which proved that Petitioner Joseph Frederick Horn actually committed the acts that formed the basis of counts 1 and 3.

After reviewing all of the testimony presented, it is clear that no evidence of the acts alleged in counts 1 and 3 was offered at trial and Petitioner challenges the State in its response to cite to the portions of the record wherein evidence of these specific acts were entered. To the extent that any of these acts were indirectly testified to, Petitioner respectfully contends that the testimony of the State's primary witnesses should be considered to lack credibility as they had their own motives for seeking conviction.

The State did use an inordinate amount of speculative statements, unsupported by direct evidence, during its opening argument and closing arguments. Most likely, the State improperly influenced the jury into concluding that Petitioner Joseph Frederick Horn actually murdered the victim Michael A. Rife and burnt his home. However, no evidence was presented at trial to back up the assertions made during the State's

opening argument and closing argument. It is possible that other persons besides Petitioner Joseph Frederick Horn may have actually murdered Michael A. Rife but this fact had no bearing on the guilt or innocence of Petitioner.

b. **The State failed to offer sufficient evidence to prove that Petitioner's acts were premeditated**

In the opinion of Petitioner, the most intellectually challenging theory in support of an entry of judgment of acquittal for count 1 of the indictment is also the strongest.

If this Honorable Court determines that sufficient evidence exists to prove Petitioner actually committed the acts for which he was convicted, an entry of judgment of acquittal should nevertheless be entered as absolutely no evidence was presented at trial which proved that Petitioner Joseph Frederick Horn acted with premeditation in regards to the acts alleged in counts 1 of the indictment.

As asserted at trial, First Degree Murder must prove a premeditated act to be the crime in violation of West Virginia Code § 61-2-1 if the State fails to prove the act of premeditation the defendant may only be convicted of a lesser included charge under Count 1 of the indictment herein.

In its opening argument and closing argument, the State referenced a calculated and premeditated crime. The State is simply wrong when it contends that the mere presence of the petitioner or the fact that the petitioner may have been the last person to see the victim in count 1 of the indictment are acts which should sustain a conviction under West Virginia Code § 61-2-1.

Absolutely no evidence at trial was offered which claimed that Petitioner Joseph Frederick Horn committed any acts of premeditation regarding count 1 of the

indictment. As noted above, Petitioner was acquitted of count 2 containing allegations of robbery regarding the victim Michael A. Rife.

Lastly, as set forth in the trial court's charge to the jury, in order to sustain a conviction for count 1 of the indictment, the State had to prove beyond a reasonable doubt that Petitioner Joseph Frederick Horn did feloniously, unlawfully, maliciously, willfully, deliberately and premeditatedly, kill, slay and murder one Michael A. Rife. As noted throughout, absolutely no evidence was offered which established that Petitioner Joseph Frederick Horn premeditated the murder of Michael A. Rife as were alleged against the victim in count 1 of the indictment.

c. The State failed to offer sufficient evidence to prove that Petitioner's acts were done maliciously

If this Honorable Court does find that sufficient evidence exists to prove Petitioner actually committed the acts alleged in count 1 of the indictment and that said actions constituted "malice" Petitioner respectfully contends that insufficient evidence was presented at trial to sustain a conviction for the offenses set forth in count 1 of the indictment as insufficient evidence was offered to prove that Petitioner's participation constituted the use of malice.

2. WEST VIRGINIA CODE § 61-6-21 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES ARTICLE III,§ 10 OF THE WEST VIRGINIA CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS SAID STATUTE IS VOID FOR VAGUENESS

Petitioner's two (2) convictions for violating West Virginia Code § 61-2-1 and § 61-3-1 should be dismissed as said statute is unconstitutional as its language should be considered void for vagueness.

> A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication. Syl. Pt. 1, *State v. Bull,* 204 W.Va. 255, 512 S.E.2d 177 (1998) *(quoting* Syl. Pt. 1, *State v. Flinn,* 158 W.Va. 111,208 S.E.2d 538 (1974)
>
> Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute. Syl. Pt. 2, *State v. Bull,* 204 W.Va. 255, 512 S.E.2d 177 *(1998) (quoting* Syl. Pt. 2, *State v. Flinn,* 158 W.Va. 111,208 S.E.2d 538 (1974).
>
> Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied. Syl. Pt. 3, *State v. Bull,* 204 W.Va. 255, 512 S.E.2d 177 *(1998) (quoting* Syl. Pt. 3, *State v. Flinn,* 158 W.Va. 111,208 S.E.2d 538 (1974).
>
> When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment. Syl. Pt. 4, *State* v. *Bull, 204* W.Va. 255, 512 S.E.2d 177 (1998) *(quoting* Syl. Pt. 4, *State* v. *Flinn, 158* W.Va. 111,208 S.E.2d 538 (1974).

A simple reading of West Virginia Code § 61-2-1 makes it clear that said criminal statute fails to delineate what conduct is prohibited by said statute with "sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. Pt. 1, *State* v. *Flinn,* 158 W.Va. 111,208 S.E.2d 538 (1974). A review of the charges for which Petitioner was convicted further illustrates this point as Petitioner was convicted of crimes that no person of ordinary intelligence could contemplate to be violations of the West Virginia Code.

West Virginia Code § 61-2-1 should be considered unconstitutionally vague because said statute makes absolutely no reference or any attempt to describe what criminal conduct must be committed by a person in order to violate said statute. The ambiguous

language of West Virginia Code § 61-2-1 makes it impossible to even determine whether a predicate criminal act is necessary or something else is necessary to meet the threshold requirement for a criminal violation of said statute.

3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE OF WEST VIRGINIA TO PRESENT ILLEGALLY OBTAINED EVIDENCE IN ITS CASE-IN-CHIEF

In syllabus point three of *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994), the Court explained the standard of review applicable to suppression determinations, as follows: "On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference."

The lower court's failure to suppress evidence secured by both the McDowell and Buchanon County deputies was clearly erroneous. The petitioner, Joseph Frederick Horn was located not more than a half mile from the home of the victim Michael A. Rife. When located the deputies determined that Mr. Horn was located in the Commonwealth of Virginia. While being detained by both the West Virginia and Virginia authorities the West Virginia deputies began collecting evidence from the petitioner, including his clothing, boots, and personal effects from inside his vehicle. There was no "hot pursuit" that initiated this detention or investigation. The officers were simply informed that the petitioner, Joseph Frederick Horn, was seen with the victim earlier in the night. Although the officers were interviewing the petitioner in the dark outside the residence they

claim to have seen blood on his dark blue pants and black boots and were protecting evidence that may have been destroyed.

The officers were operating without search warrants and had a hard time determining what state they were located or who had authority to detain the petitioner and subsequently arrest and question him. This was evident because the McDowell County officers were collecting evidence illegally in the Commonwealth of Virginia while the Virginia officers were obtaining statements from the petitioner, Joseph Frederick Horn.

All evidence collected and obtained by both investigating agencies was obtained illegally and without proper search warrants. The McDowell County officers were collecting evidence outside their jurisdiction after being told the petitioner was located in Virginia. Despite this knowledge they proceeded to violate the Constitutional Rights of the petitioner, Joseph Frederick Horn.

The actions of McDowell County authorities were clearly erroneous and the evidence obtained and secured by them should have been suppressed by the lower court. This evidence, which in itself did not convict the petitioner, was highly prejudicial. The State presented no evidence that the petitioner, Joseph Frederick Horn, murdered Michael A. Rife.

4. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL

Petitioner Joseph Frederick Horn respectfully requests that Circuit Court committed reversible error when it failed to grant Petitioner a new trial on counts 1 and 3 of the indictment as the interest of justice requires the same.

Rule 33 of the West Virginia Rules of Criminal Procedure states as follows:

> The Court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant motion only on remand ofthe case. A motion for a new trial based on any other grounds shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period.

In support of Petitioner's request for a new trial, Petitioner offers the following arguments:

STATE MADE IMPROPER REMARKS TO JURY

The State's overuse of speculation and conjecture during its opening argument and closing argument require that a new trial be had as said remarks clearly prejudiced the accused and resulted in manifest injustice. *See State v. Bell,* 189 W.Va. 448,432 S.E.2d 532 (1993). Although instructed to not consider opening arguments and closing arguments of the parties as evidence, it appears the jury improperly relied on the conjecture repeatedly recited by the State during said arguments as it returned a verdict of guilty against Petitioner Joseph Frederick Horn while no actual or credible evidence was presented at trial which supported the State during said arguments.

STATE OFFERED IMPROPER EVIDENCE AND ENGAGED IN MISCONDUCT

During its opening argument and during the questioning of witnesses, the State improperly sought to present evidence previously suppressed.

Although the lower court did its best to prevent the State from suborning improper and unduly prejudicial evidence, the jury still heard evidence regarding a previously suppressed knife by the State. By the State arguing and soliciting improper

evidence, justice requires that Petitioner Joseph Frederick Horn be given a new trial on counts 1 and 3 of the indictment.

POTENTIAL JUROR MISCONDUCT

Petitioner Joseph Frederick Horn recognizes that Rule 606(b) of the West Virginia Rules of Evidence precludes inquiry into matters of intrinsic juror deliberations; however, it appears that either an outside influence or an improper compromise verdict was reached in this case. Petitioner further recognizes that issues of improper juror compromise may fall outside the scope of improper juror misconduct requiring a new trial. *See State* v. *Ex Rel. Neill* v. *Nutter,* 99 W.Va. 146, 128 S.E.2d 142 (1925). Also, improper coercion from political or other beliefs may have improperly influenced the jury.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Petition be granted; that the judgment of the Circuit Court of McDowell County be reversed, set aside, or a new trial be granted on counts 1 and 3 and that Petitioner be immediately released from incarceration.

Signed:_____

Thomas H. Evans, III (WV Bar # 9967)
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2012, true and accurate copies of the foregoing **Petitioner's Brief** 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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Signed: _____

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