

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET No. 13-0769

**State of West Virginia, Plaintiff
Below, Respondent**

Appeal from a final order of the
Circuit Court of Hampshire County
(12-F-54)

vs.) No. 13-0769

**David M. Corey, Defendant Below,
Petitioner**

Petitioner's Brief

Counsel for Petitioner, David M. Corey

Lauren M. Wilson, WV Bar # 11743
Sites Law Firm, P.L.L.C.
PO Box 848, Keyser, WV 26726
(304)-788-4683
laurenwilson192@gmail.com

TABLE OF CONTENTS

SECTION	PAGE
ASSIGNMENTS OF ERROR	4
STATEMENT OF CASE	4-6
SUMMARY OF ARGUMENT	6-7
STATEMENT REGARDING ORAL ARGUMENT	7
ARGUMENT	7-17
CONCLUSION	17
CERTIFICATE OF SERVICE	17-18

TABLE OF AUTHORITIES

AUTHORITY	PAGE
<u>State v. Worley</u> , 369 S.E.2d 706, 179 W. Va. 403(1988)	8
<u>State v. Adkins</u> , 346 S.E. 2D 762, 176 W. Va. 613 (1986)	8
West Virginia Code § 62-3-1	12
<u>Keller v. Ferguson</u> , 177 W. Va. 616, 355 S.E. 2D 405 (1987)	12
<u>State v. Hanlin</u> 176 W. Va. 145 (1986)	12
<u>Pitsenbarger v. Nuzum</u> , 172 W. Va. 27, 303 S.E. 2D 255 (1983)	12-13
<u>State ex rel. Workman v. Fury</u> , 168 W. Va. At 221, 283 S.E. 2D 851, 853 (1981)	13

ASSIGNMENTS OF ERROR

1. ANY EVIDENCE GATHERED FROM THE SEARCH OF THE DEFENDANT'S HOME AND AUTOMOBILE SHOULD HAVE BEEN SUPPRESSED BECAUSE BOTH WARRANTS WERE BASED ON UNCORROBORATED HEARSAY AND ARE FACIALLY INVALID
2. KNIVES AND AMMUNITION ADMITTED INTO EVIDENCE SHOULD HAVE BEEN EXCLUDED AS THEY WERE IRRELEVANT TO THE CHARGE AND ANY MINIMAL PROBATIVE VALUE THEY MAY HAVE HAD WAS OUTWEIGHED BY THEIR DANGER OF PREJUDICE.
3. THE PETITIONER'S RIGHTS WERE VIOLATED BY THE CONTINUATION OF HIS TRIAL WITHOUT JUST CAUSE.
4. THE PETITIONER'S PREVIOUS CRIMINAL RECORD WAS HEARD FROM THE JURY AND A MISTRIAL SHOULD HAVE BEEN DECLARED.
5. THE DEFENDANT'S CONVICTION IS NOT SUPPORTED BY FACTS.
6. THE DEFENDANT'S CONVICTION IS NOT SUPPORTED BY LAW.

STATEMENT OF THE CASE WITH ALL FACTS PERTINENT TO THE ASSIGNMENTS OF ERROR

Daniel Corey was shot and killed on January 8, 2012 in the home where he lived with his mother, niece, and maternal aunt. On February 14, 2012, his brother, the Petitioner, David M. Corey, was arrested and charged with his murder. A preliminary hearing on the charge was conducted August 24, 2012 and on September 5, 2012 an indictment was handed down by the Hampshire County Grand Jury against the Petitioner for one count of murder (A.R. 15) Throughout the course of his case, the Petitioner's case was prosecuted by two different prosecutors, heard at times by four different circuit court judges, and the Petitioner was represented by two different sets of defense attorneys.

The case began on January 8, 2012 when Daniel Corey, the alleged victim, was residing with his mother, Dorothy Corey, his niece, 10 year-old Hanna Corey, and his maternal aunt, Wanda, who was bedridden and stayed in the downstairs of the home. After Dorothy Corey left for work, at approximately 8:30 PM, Hanna Corey heard a shot and ran upstairs to find her uncle

bleeding profusely and making sounds from his chest. She called her grandmother who told her to hang up and dial 911. While Daniel Corey was initially thought to have committed or attempted to commit suicide, there was no weapon found when first responders got there and they determined that Daniel Corey had been murdered. Dorothy Corey returned home and later went to the hospital with Daniel. Hannah remained at the home.

Samantha Corey, a daughter-in-law of Dorothy Corey, went to the home after receiving a call about what had occurred. Upon arriving she was told that she could not take Hanna with her, as she wasn't a parent. She left to go to the hospital, but on the way she decided that if that were her daughter there, she would want to know, so she went to pick up the Petitioner, David M. Corey, from his home a few miles away. Upon arrival she knocked on the door, and then the Petitioner came around the car and got in her car. They drove back to Dorothy Corey's home. When they arrived, police talked to both of them and tested the Petitioner for gunshot residue.

Within days after the murder, the Petitioner's then girlfriend, Kathy Stonebraker, gave statements to the police indicating that she knew David had killed Daniel. The police executed a search warrant on David Corey's home and found a box of .22 ammunition and some collector's knives in the leaves around his home.

Throughout the coming weeks, various witnesses came forth claiming that they had information that the brothers were fighting and that David Corey had killed Daniel due to problems with Daniel's lifestyle and a dispute over who would inherit the home.

On April 26, 2013, after a four-day jury trial in the Circuit Court of Hampshire County, West Virginia, the jury sitting in the matter returned a verdict of guilty of Murder in the First Degree against the Petitioner. (A.R. 186-187) After rendering the verdict of guilty, the jury then made recommendation that the Petitioner not receive mercy and spend the remainder of his life

in prison. All post-trial motions filed by the Petitioner were denied.(A.R. 161-166) The murder weapon has still never been found.

The procedural history of the case is confusing based upon the sheer number of players. The case was prosecuted by former Hampshire County Prosecuting attorney Stephen Moreland from February 2012 until December 2012. Mr. Moreland lost the election for Hampshire County Prosecuting Attorney to current prosecutor Daniel M. James. The Circuit Court Judge assigned to the case also changed frequently. The case began with Judge Charles Parsons, was heard by Judge Cookman after January 2013, then Judge Cookman left for the legislature and a few hearings were presided over by senior status Judge Andrew Frye. Finally, Judge Thomas Keadle took over presiding over the case and also presided over the trial.

SUMMARY OF ARGUMENT

The primary argument of the Petitioner is this; he did not receive the fair trial guaranteed to him by the West Virginia and United States Constitutions. Evidence introduced in the Petitioner's prosecution, namely evidence of ammunition and collector's knives, should not have been introduced for several reasons. The knives and ammunition should not have been introduced due to a fatal flaw in the search warrant. Further, they are irrelevant. Even if they were found to be relevant and admissible, their prejudicial nature far outweighs any probative value they possess. While the murder weapon has never been found and the caliber of the recovered bullet has never been conclusively determined, we do know one thing conclusively and that is that Daniel Corey was not shot with a knife. The introduction of these weapons of violence which had no probative value was improper and the Petitioner did not receive a fair trial.

The Petitioner's rights were also infringed upon by the repeated continuances of his case in violation of his right to a speedy trial and in violation of West Virginia's one term rule. In addition, one witness, upon cross examination by the State revealed the Petitioner's prior felony record. The jury heard this remark, and while a cautionary instruction was given, a mistrial should have been declared.

The jury verdict in this case was not supported by law or fact. The case presented by the State was completely circumstantial. The State failed to prove material elements of the crime of first degree murder. The facts do not support the conclusion for a reasonable jury to vote guilty and the verdict is not supported by law either as material elements of the crime were not proven by the State.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Under Revised Rule of Appellate Procedure 18(a), oral argument is unnecessary when the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. It is the Petitioner's belief that the facts and legal arguments are presented in the Petitioner's brief and that oral argument would not assist the Court in rendering an opinion. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. ANY EVIDENCE GATHERED FROM THE SEARCH OF THE DEFENDANT'S HOME AND AUTOMOBILE SHOULD HAVE BEEN SUPPRESSED BECAUSE BOTH WARRANTS WERE

BASED ON UNCORROBORATED HEARSAY AND ARE FACIALLY INVALID.

At a suppression hearing held October 29, 2012 the Hampshire County Circuit Court heard testimony on two motions to suppress filed by the Defendant. The Defendant's counsel argued that the search warrants were invalid and presented case law on same. The Court held the motions in abeyance and directed Counsel to brief the issue. (A.R. 25-26) As the hearing progressed and the Court heard evidence relating to the box of collector knives and .22 caliber rifle rounds found in the curtilage of the Petitioner's home, Counsel for the Petitioner moved the Court to suppress this evidence and the Court did Order that the State shall refrain from presenting any evidence or testimony regarding the discovery of these knives and .22 ammunition at the Defendant's home. (A.R. 25)

Despite the evidence being suppressed on other grounds, counsel for both the Defendant and the State continued to brief the warrant related issue. (A.R. 27-29, 45-48)

“Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.” Syl. Pt. 2, *State v. Worley*, 369 S.E.2d 706, 179 W. Va. 403(1988); Syl. Pt. 4, *State v. Adkins*, 346 S.E. 2D 762, 176 W. Va. 613 (1986).

This Honorable Court has also stated that “ it is improper for a circuit court to permit testimony at a suppression hearing concerning information not contained in the search warrant affidavit to bolster the sufficiency of the affidavit unless such information has been

contemporaneously recorded at the time the warrant was issued and incorporated by reference into the search warrant affidavit.” *Adkins*, 346 S.E. 2D at 769.

In *Worley*, as in this case, the Defendant was convicted of first degree murder. The investigating officers obtained a statement from a bartender who stated that the defendant had been present with the victim just prior to the victim's death. The officer used that statement to obtain a warrant for the defendant's residence. The West Virginia Supreme Court held that, “ a conclusory affidavit is not acceptable nor is an affidavit which can include the corroborative efforts of police officers.” The Court concluded that the affidavit in that case revealed no information which would substantiate the general hearsay statement.

The search warrants at hand are much the same as those in *Worley*, they are based solely on hearsay statements with nothing to corroborate them. (A.R. 20-21) Kathy Stonebraker made numerous statements throughout the course of the case. Attachment C indicates that Chief See of the Romney Police Department spoke with Ms. Stonebraker on January 10, 2013, 2 days after the shooting. She gave statements that she had known David Corey for 19 months, that she believed he was involved in his brother's death, and indicated that David was angry with Daniel for eating food belonging to the Petitioner's daughter, causing their mother to be sick, and alleging that David had “messed around” with one of his girlfriends. She stated that she had seen David on Monday when he told her that Daniel had been shot. She indicated the time previous to that when she had seen him was on Saturday January 7, 2012, She indicated that on that January 7 date David had spoken to her about Daniel and the things he was doing to annoy him. She also added that she knew David had a pistol, that he hides a gun above his mother's house in the woods, and that she talked to Hanna on January 9th and Hanna told her that she heard someone outside in the tree making noise. (A.R. 20-21)

Nothing else is found in the four corners of the warrant and nothing else was contemporaneously recorded. The search warrants contained only hearsay and failed to provide either a substantial basis for crediting the hearsay or corroborating efforts of the investigating officer. Nothing in the warrant or supporting documentation corroborates these statements or provides evidence of the witness's credibility. Because of this, the warrants are facially invalid and any evidence gathered as a result of these warrants should have been suppressed by the trial court. The underlying policy beneath the rule is to prevent the State from infringing upon the protected privacy rights of a citizen, without more than hearsay statements from an unreliable individual. Unfortunately, that is all the officers used to get these search warrants, making them invalid on their face. Any evidence gathered from them should have been suppressed.

II. KNIVES AND AMMUNITION ADMITTED INTO EVIDENCE SHOULD HAVE BEEN EXCLUDED AS THEY WERE IRRELEVANT TO THE CHARGE AND ANY MINIMAL PROBATIVE VALUE THEY MAY HAVE HAD WAS OUTWEIGHED BY THEIR DANGER OF PREJUDICE.

On October 19, 2012, the Circuit Court of Hampshire County entered an Order prohibiting the State of West Virginia from introducing evidence of knives found outside of the Petitioner's residence, and subsequently found in his vehicle. (A.R. 23) Prior to trial, the State of West Virginia requested the Court to reconsider the prior October 16 ruling and allow introduction of the knives in the trial of this matter. (A.R. 124-127) On April 19, 2013 the Circuit Court reconsidered the matter and reversed the previous rulings, allowing the State to introduce evidence of the knives during its case-in-chief. (A.R. 145-148)

While the experts at trial were never clearly able to identify what weapon, or even what caliber of weapon was used to kill the victim, there is no doubt that it was not a knife. There was no testimony presented of any wounds from a knife. The State introduced the knives to show that

if the knives belonged to him and he knew about the knives found outside the home, the Petitioner must have known about the ammunition outside the home as well. Regardless of the State's contention, and pursuant to W. Va. Rule of Evidence 403, the evidence nonetheless led to "confusion of the issues" during the trial of this matter. Because introduction of the knives at trial offered little relevance and because introduction of the knives confused the issues before the jury, evidence of these knives should have been excluded.

The procedural history of the ruling relating to these knives and .22 caliber ammunition is a confusing one due to the number of prosecutors and Judges involved in the case. Judge Parsons excluded them on a Motion in limine basis separately from the above reasoning related to the warrant. They were excluded at the October 29, 2012 hearing. On January 30, 2013 the newly elected prosecutor, Daniel M. James, informed the Honorable Andrew Frye, Jr., that the State was considering filing a motion of reconsideration. Judge Frye advised that he would only be on the bench for one additional week and would not reconsider the court's ruling. (A.R. 114) On April 4, 2013 the State filed a Supplemental Motion for Reconsideration before Judge Keadle, based on what it considered to be newly discovered evidence. The Court heard arguments of counsel on April 10, 2013 and denied the State's motion for reconsideration. Finally, on April 19, 2013, just a few days before the trial began on April 23, 2013, the Court reversed itself and allowed evidence of the knives and ammunition to be admitted into evidence based on newly discovered evidence.

The Court was correct in its ruling the first two times, but erred the third and most important time it considered the knives and .22 caliber ammunition.

III. THE PETITIONER'S RIGHTS WERE VIOLATED BY THE CONTINUATION OF HIS TRIAL WITHOUT JUST CAUSE.

Romney Police arrested the Petitioner and placed him in custody on February 14, 2012. He has remained in custody since that date. While the Petitioner was arrested in February, he was not indicted until the September term of Court. The Petitioner moved to have bond set on September 6, 2012, however the Court did not set bond due to the nature of the charges. (A.R. 57) The Petitioner's trial was originally scheduled for December 13 and 14, 2012. That trial date was set at the suppression hearing on October 29, 2012. (A.R. 26-27) As a trial was set within the current term of court, the Defendant did not file a motion for a speedy trial or assert the one-term rule. It would seem that there was no point, as the timely scheduling of the trial had assured the Defendant that his Constitutional right to a speedy trial was being protected. Both the State and the Defense proceeded with trial preparations, gathering witnesses, procuring experts, and preparing for trial. Suddenly, on December 3, 2013, a mere 10 days before the trial was to begin, the State filed a Motion to Continue the trial as scheduled. (A.R. 50-51) Counsel for the Defense then asserted the Defendant's desire for a speedy trial by filing a motion for a speedy trial on that same date, December 3. (A.R. 52-53) As grounds for the State's motion, Prosecutor Moreland indicated that he had recently had surgery and would need an additional four to six weeks to fully recover and that he was "physically unable at this time to adequately prepare for and try the case based on the current scheduled trial date." By doing so, Prosecutor Moreland was seeking not only to push the trial to the next term of court, but also into the first term of the newly elected prosecutor.

West Virginia Code § 62-3-1 states that, "When an indictment is found in any county, against a person for a felony or misdemeanor, the accused, if in custody, or if he appear in discharge of his recognizance, or voluntarily, shall, unless good cause be shown for a continuance, be tried in the same term."

This Honorable Court addressed this “One Term Rule” in *Keller v. Ferguson*, 177 W. Va. 616, 355 S.E. 2D 405 (1987) when in Syllabus Point One they stated, “W. Va. Code, 62-3-1, is not limited to the term of court at which an indictment is returned, but is applicable to any term of court in which an accused asserts his right to a prompt trial. Where such right is asserted, the accused must be tried during that term unless good cause can be shown for a continuance.” This Honorable Court has also stated that, “Under WV Code §62-3-1, which provides a personal right to criminal defendants to be tried more expeditiously than the Constitution requires, the burden is on the party seeking this statutory protection to show that the trial was continued without good cause.” Syllabus Point 2, *State v. Hanlin* 176 W. Va. 145 (1986), quoting Syllabus Point 2, *Pitsenbarger v. Nuzum*, 172 W. Va. 27, 303 S.E. 2D 255 (1983). The Court in *Pitsenbarger* went on to say that “Although difficulties beyond the control of the court or litigants, along with the reasons listed in WV Code 62-3-21 (1959), can constitute good cause, the Circuit Court should not grant continuances for the prosecution’s convenience.” at 327.

While at first blush it would appear that this continuance was granted due to the health concerns of the Prosecuting Attorney and this was a case for “good cause” for a continuance, the record indicates otherwise. Counsel for the Petitioner represented to the Court that while Prosecutor Moreland indicated he was too ill to proceed to trial, his work schedule indicated otherwise. Two days before the trial was to begin, on December 11, 2012, the Prosecutor attended 15 hearings. The prosecutor made appearances in the instant case on both December 11 and December 13, the date the trial was originally set to begin. Counsel for the Defendant noted that the trial could have been conducted or assisted by the Assistant Prosecuting Attorney for Hampshire County, a position he had held for 9 years. (A.R. 87-93)

Further, the Defendant must assert his speedy trial right by a timely written motion. The Court further addressed the One Term Rule by stating that “the protection afforded by this rule is

not self-operating and that the burden is properly upon the defendant to make a record if he is to assert this right or assign error to its denial.” *State ex rel. Workman v. Fury*, 168 W. Va. At 221, 283 S.E. 2D 851, 853 (1981).

The Defendant has complied with the requests of the law, by filing a written motion and by stating, “the Defendant respectfully requests his right to a trial within the September term of this Honorable Court.” (A.R. 52-53)

A hearing was held on the motion to continue on December 3, 2012 before the Honorable Charles Parsons. Counsel for the Petitioner asserted that the Assistant Prosecutor could proceed to trial. Upon consideration of all presented, the Court found that “although the Defendant has a statutory right to a trial this term of Court, the Court has discretion to continue the matter to the next term for cause. The Court finds good cause for the continuance based on the Prosecuting Attorney's medical circumstances”(A.R. 57-59) The Defendant's objection was saved and the Defendant filed a motion to dismiss based on the violation of the one term rule. (A.R. 87-93) That motion was also denied. (A.R. 99)

The continuance of the Defendant's trial from his originally scheduled trial date was error that infringed upon the Constitutional rights of the Petitioner to a speedy trial. While the Defendant did everything required of him in WV Code § 62-3-1, the State did not. Good cause did not exist to grant the continuance.

IV. THE PETITIONER'S PREVIOUS CRIMINAL RECORD WAS HEARD BY THE JURY AND A MISTRIAL SHOULD HAVE BEEN DECLARED.

A suppression hearing was held in this case on October 16, 2012. At that time Petitioner's counsel requested the Court to ensure that the State, or its witnesses, refrain from making

reference to Petitioner's previous criminal record. The Court ordered that no witness should reference the Petitioner's previous criminal record and additionally, that no documentary evidence should contain reference to the Petitioner's criminal record during the trial. (A.R. 23) The Court instructed both parties to instruct their witnesses as to not saying anything related to the criminal record of the Petitioner. The Defendant presented the testimony of Samantha Corey, the Petitioner's sister-in-law during their case in chief. Ms. Corey testified on direct examination that prior to the night of the shooting, she had not spoken with the Petitioner for the two previous years. Nonetheless, the Prosecuting Attorney, on cross examination, began to question Ms. Corey about events that had occurred in those two years she stated she hadn't spoken to the Petitioner. The Prosecuting attorney asked Ms. Corey why the Petitioner was unable to reside at Valley View apartments to which she replied she believed it was "he is a felon". (A.R. T. 89-90 E) As a result of the State's line of questioning, the jury learned that the Petitioner had prior felonies, which knowledge substantially prejudiced Petitioner throughout the remainder of his trial.

V. THE DEFENDANT'S CONVICTION IS NOT SUPPORTED BY FACTS.

The State failed to prove many of the factual contentions necessary to support a finding of guilt. The State failed to prove that the positive gunshot residue results originated on Defendant's hand as a result of Defendant firing a rifle with Remington 30-06 caliber ammunition, that the Petitioner ever possessed a 30-06 caliber rifle, and that the Petitioner was present at the crime scene at the time the victim was killed.

During the trial, the Defendant's expert testified that the ammunition found outside of the Defendant's residence does not contain tin, an element found in the particle of gunshot residue

found on the Petitioner's right hand. The testimony adduced at trial indicated that the tin element present in the particle on the found on the Petitioner's hand came from cross-contamination or firing a rifle which had previously contained tin ammunition. A reasonable jury could not conclude that the positive gunshot residue results originated as a result of firing a 30-06 caliber rifle with Remington 30-06 Core-Lokt ammunition.

The weapon used to kill the victim has never been found and the State failed to produce evidence of what the murder weapon was. The State presented testimony that the Petitioner had attempted to sell a 30-06 rifle to a gentleman in a local bar. The State further presented evidence that the bullet recovered from the crime scene may have been one of seventy-six potential calibers. As a result, a reasonable jury could not conclude that the Defendant possessed a 30-06 rifle and that the gunshot wound of the victim originated from a 30-06 rifle.

Last, but certainly not least, the State failed to present any evidence that the Petitioner had been physically present during the time frame when the victim was killed. The State presented evidence that the Petitioner was present in the home near 6:00 pm and that the victim was not shot until around 8:15 PM. The Petitioner presented testimony that he was present at a Liberty convenience store located approximately 2.0 miles from the crime scene at approximately 8:54 PM. During cross examination, the investigators on the case testified that they found no evidence that the Defendant had been present at the crime scene when the victim was killed.

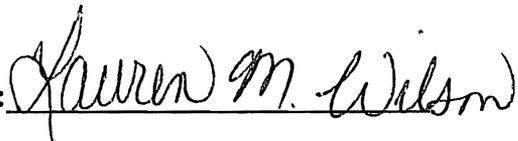
VI. THE DEFENDANT'S CONVICTION IS NOT SUPPORTED BY LAW.

The jury's verdict of guilty of murder in the first degree is not supported by law. To render the jury's verdict, the jury had to find that Defendant, David M. Corey, in Hampshire

County, West Virginia, on January 8, 2012, did willfully, intentionally, deliberately, and premeditatedly with malice, kill Daniel Corey. Based upon the facts presented to the jury, a reasonable jury could not conclude, beyond a reasonable doubt, the Petitioner, David M. Corey, in Hampshire County, West Virginia, on January 8, 2012, did willfully, intentionally, deliberately, and premeditatedly with malice, kill Daniel Corey.

CONCLUSION

The conviction of the Petitioner should be overturned and the case should be remanded to the Circuit Court of Hampshire County for a new trial.

SIGNED: 

Lauren M. Wilson, WV Bar # 11743
Counsel of Record for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2013, 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:

Chris Dodrill
Assistant Attorney General
Office of the Attorney General of West Virginia
Appellate Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301

Signed: Lauren M. Wilson

Lauren M. Wilson, WV Bar # 11743
Counsel of Record for Petitioner