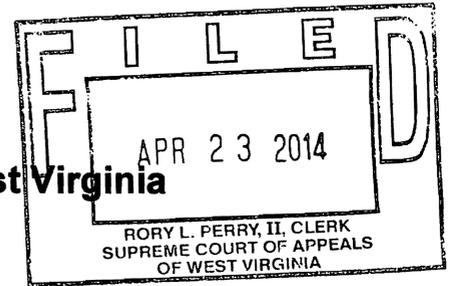


In the Supreme Court of Appeals of West Virginia

DOCKET NO. 12-1259



STATE OF WEST VIRGINIA, Plaintiff
Below, Respondent,

v.

Appeal from a Final Order
of the Circuit Court of
Wayne County (10-F-17)

JAMES E. MARCUM, Defendant
Below, Petitioner.

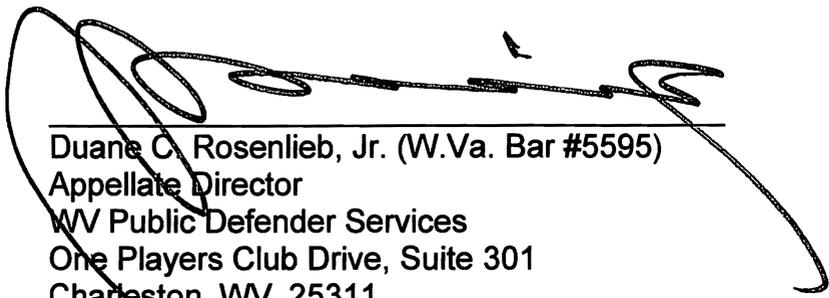
Status Report to the Court

Comes now the Petitioner, James E. Marcum, and with his status report to this Honorable Court regarding its previous recommitment of this matter to the Circuit Court of Wayne County for the limited purpose of conducting a hearing on Petitioner's Motion for a New Trial.

1. The Circuit Court held a hearing on the Petitioner's Motion for a New Trial on March 27, 2014.
2. The Circuit Court has denied the Petitioner's Motion for a New Trial (see copy of attached order).

Wherefore, the Petitioner advises this Honorable Court that this matter is now ripe to be restored to the active docket of this Court and that the Court may consider the Briefs as filed or, if it determines appropriate, set a new briefing schedule to brief issues raised by the Circuit Court's order denying a new trial.

JAMES E. MARCUM
By Counsel



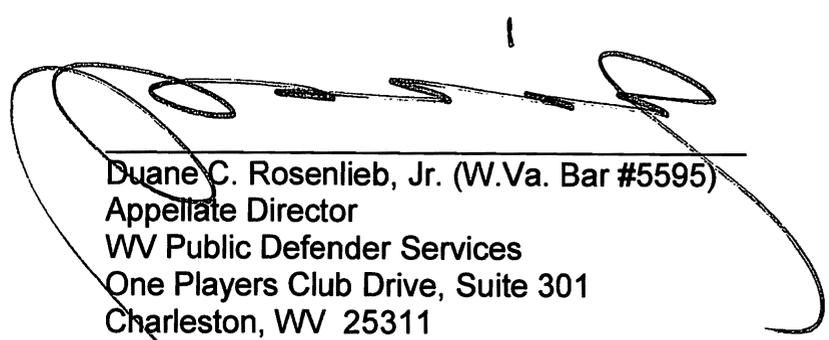
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CERTIFICATE OF SERVICE

I hereby certify that on **April 23, 2014**, true and accurate copies of the foregoing
Status Report to the Court were served on the parties below in the manner as
indicated:

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Assistant Attorney General
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IN THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

v.

JAMES EVERETT MARCUM,

Defendant.

Indictment No.: 10-F-017

Judge: James H. Young, Jr.

FILED
CLERK OF COURT
14 APR 16 PM 12:59
WAYNE COUNTY, WV
BY [Signature]

ORDER

On the 27th day of March 2014, this matter came before the Court upon the Defendant's Motion for a New Trial. The Defendant appeared in person and by counsel, Duane C. Rosenlieb, Jr. Esq. The State of West Virginia appeared by prosecuting attorney, Tom Plymale.

The Defendant in his motion and oral argument essentially alleges that his motion should be granted for four reasons: Brady/discovery violations that have since lead to newly discovered evidence, State failed to disclose that the Defendant was under arrest or de facto arrest at the time the statement was taken, trial counsel was ineffective, and the Defendant's *Miranda* waiver and statement were involuntary. Thereupon, the Court heard arguments of the parties, reviewed the original motion and the Submission of Medical Records, and found as follows:

1. Under Rule 33 of the West Virginia Rules for Criminal Procedure "[a] new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in

ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce and opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.” Syllabus pt. 5, *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999).

2. Additionally, if the Defendant is alleging a deprivation of constitutional due process that must be analyzed under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982). Those cases stated that the following three elements are required to be present to be granted a new trial: “(1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.” Syllabus pt. 2, *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007).

3. Finally, if the Defendant avers that the lack of disclosure merely violated Rule 16 of the West Virginia Rules of Criminal Procedure then the Court will analyze that using the two prong analysis from *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994). That analysis requires the Court to determine “(1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant’s case.”

4. Defendant alleges that the above quoted standards were breached by the State for failing to disclose that (1) Defendant was in custody at the time he gave his statement and that the Kentucky State Police was guarding his room, (2) Kentucky State Police signed an

acknowledgment regarding the hospital's policy concerning armed guards, (3) Defendant's removal from the hospital was coordinated with the West Virginia State Police, (4) At release Defendant was signed out by the Kentucky State Police and his pain medicine was taken by the Kentucky State Police, and (5) Defendant was taken from the hospital in handcuffs directly to jail.

5. There is nothing to indicate that the Defendant was in the custody of law enforcement officials before his discharge from the hospital at 1:45 p.m. on December 10, 2009.

6. Additionally, the Defendant was given the Interview and Miranda Rights Form at 12:06 a.m. and signed it on 12.08 a.m., and the arrest warrant was issued by the Magistrate of Wayne County later sometime on December 10, 2009. Therefore, the arrest warrant had not even been issued at the time the statement was taken by the West Virginia State Police.

7. Accordingly, the Defendant was not in actual or de facto custody at the time the statement was taken by the West Virginia State Police. Therefore, the State could not have violated the principles stated above regarding disclosure of the Defendant's custodial status.

8. The State served the Defendant's counsel with Responses to Defendant's Request for Disclosure of Evidence on the 12th day of April, 2010.

9. This disclosure included the four documents attached to this motion.

10. Regarding, the Defendant's contention concerning the Kentucky State Police signing an acknowledgment with the hospital regarding armed guards. The document titled Three Rivers Medical Center- Guards with Prisoners Patients was provided to the Defendant in the aforementioned discovery response. As such, it is not new evidence.

11. The fact that the Defendant's release was coordinated with the West Virginia State Police was not new evidence as it was mentioned in the Interdisciplinary Care Plan

prepared by the hospital and supplied to the Defendant by the State in the aforementioned discovery response.

12. Additionally, the Defendant points to the failure to disclose that the Defendant was signed out by the Kentucky State Police and that they took control of his pain medication. As previously stated this is not new evidence. This was noted on both the Defendant's Discharge Summary and Discharge Medication Instruction Sheet which was provided in the aforementioned discovery response.

13. Finally, the Defendant states that the State did not disclose that the Defendant taken in handcuffs from the hospital to jail. The Discharge Summary plainly stated on the line for destination that the Defendant was bound for the Big Sandy Detention Center via Police Escort. As stated previously this document was supplied to the Defendant by the State in the aforementioned discovery response.

14. The documentation does appear to be silent regarding the Kentucky State Police's use of handcuffs on the Defendant, but the Court opines that the use or non-use of handcuffs is not the type of evidence that the State would be required to disclose since the records clearly indicate the Defendant was in custody at the time of discharge.

15. Accordingly, the Court is of the opinion that it is unnecessary to proceed with any of the aforementioned analyses as the Defendant has failed to submit any new evidence to be examined under Rule 33 of the West Virginia Rules of Criminal Procedure or show any violations of Rule 16 of the West Virginia Rules of Criminal Procedure or *Brady*.

16. The Defendant also contends that his motion should be granted because of ineffective assistance of trial counsel.

17. “In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” Syllabus pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114, (1995).

18. Specifically, the Defendant alleges that trial counsel was ineffective because the suppression hearing was held without trial counsel having the aforementioned documents and the Defendant's signed Interview and Miranda Rights Form.

19. As to the documents previously mentioned those were all turned over to the Defendant by the State in discovery and although the documents were not introduced in the suppression hearing much of the information contained in those documents was used by defense counsel at the hearing.

20. Regarding, the Interview and Miranda Rights Form which was turned over to Defendant's counsel at the suppression hearing. It is a one page preprinted form which was initialed and signed by the Defendant.

21. At the suppression hearing the Defendant never denied initialing or signing the form.

22. Furthermore, the Defendant's position at that hearing was he did not understand what he signed and that his ability to understand was undermined by his medications.

23. It was not unreasonable for defense counsel to believe that based upon the position they were advocating that additionally time to review the Interview and Miranda Rights Form would be fruitless.

24. Accordingly, when applying these facts to the two-pronged test in *Strickland* the Court cannot find that based on an objective standard that defense counsel was deficient.

25. The Defendant's final contention is that his *Miranda* waiver and statement was not voluntary.

26. After a hearing held pursuant to Defendant's Motion to Suppress a statement given by the Defendant on December 10, 2009, the Court found by a preponderance of the evidence that the totality of the circumstances demonstrated the Defendant knowingly, intelligently, and voluntarily waived his *Miranda* warnings.

27. The Defendant has asserted no additional facts that would cause the Court to alter the Court's previous finding.

28. The documents submitted to the Court with the Defendant's Submission of Medical Records do not qualify as new evidence as these documents were also supplied to the Defendant in the aforementioned discovery response.

Therefore, based on the above reasoning, the Court **DENYS** Defendant, James E. Marcum's, Motion for New Trial.

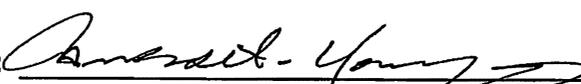
All accordingly which is **ORDERED** and **DECREED**.

Enter this 16th day of April, 2014.



ORDER

ENTER:


HONORABLE JAMES H. YOUNG, JR.

A COPY TESTE
Milton J. Ferguson II Clerk