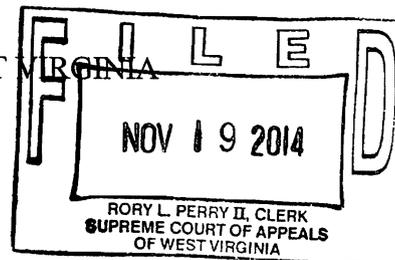


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0639



STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

vs.

Appeal from a final order of the
Circuit Court of Harrison County
(Case No. 13-F-76-3)

DARNELL CARLTON BOUIE,
Defendant Below, Petitioner.

PETITIONER'S REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary upon this appeal under Rule 19 of the Revised Rules of Appellate Procedure as this appeal involves (1) assignments of error in the application of settled law; (2) an unsustainable exercise of discretion where the law governing that discretion is settled; (3) insufficient evidence; and (4) narrow issues of law. Therefore, Petitioner respectfully requests that this matter be scheduled for Rule 19 oral argument.

ARGUMENT

I. The facts of cases cited in support of the position that Petitioner's cruiser statements were properly admitted, in compliance with Petitioner's Sixth Amendment rights, are vastly different from the facts of this case.

As outlined in Petitioner's Brief, in ruling that Petitioner's alleged statements to investigating officer Sgt. Joshua Cox while being transported in a police cruiser were admissible, the Circuit Court cited this Court's decisions in *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987), *State v. Parker*, 181 W.Va. 619, 383 S.E.2d 801 (1989), and *State v. Lucas*, 178 W.Va. 686, 364 S.E.2d 12 (1987).¹ Petitioner's Brief, p. 27. In each of those cases, the accused was advised of his *Miranda* rights and signed a written waiver prior to making inculpatory statements.

In its Response Brief, the State similarly cited cases on the issue of whether Petitioner knowingly and voluntarily waived his right to counsel with circumstances unlike those in the instant matter. More specifically, the State cited *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), as

¹ These cases were cited by the Circuit Court in its March 12, 2014, *Order Ruling on Pre-Trial Motions*. In FN 9 on page 25 of its Response Brief, the State represents that Petitioner "appears to have erroneously" failed to include this important Order in the Appendix Record. Upon review of the Response Brief, the undersigned counsel promptly conferred with State's counsel and advised that the *Order Ruling on Pre-Trial Motions* is found at page 459 of the Appendix Record. State's counsel confirmed the same and acknowledged that FN 9 should be disregarded.

an example of an accused effectively waiving his right to counsel by initiating conversation with authorities (and thus causing the accused's statements to be properly admissible at trial).

Response Brief, p. 16, 31. In *Oregon*, prior to the accused making the inculpatory statements where were the subject of the appeal:

- he was advised of his *Miranda* rights twice,
- he then was transferred by a police officer from the police station to jail (a mere 10-15 miles) during which time he initiated conversation with the officer,
- the officer initially responded by stating, "You do not have to talk to me. You have requested an attorney and I don't want to talking to me unless you so desire because anything you say – because – since you have requested an attorney, you know, it has to be at your off free will."
- the accused expressed his understanding to the officer's warning, and then engaged in a discussion with the officer,
- the discussion between the officer and accused resulted in the accused consenting to undergo a polygraph examination,
- the accused was again read his *Miranda* rights, and signed a written waiver of those rights,
- the polygraph examination resulted in the accused confessing to the crime.

462 U.S. at 1041, 1042. The factual circumstances in *Oregon* are in stark contrast to the facts giving rise to Petitioner's alleged statements to Sgt. Cox insofar as it is undisputed that Petitioner: was not advised of his *Miranda* rights, did not sign any form of written waiver of his *Miranda* rights or right to counsel, Sgt. Cox did not caution Petitioner that he (Petitioner) was under no obligation to speak with police, and prior to making the alleged statements to Sgt. Cox, Petitioner had traveled with the officer in the police cruiser for approximately 150 miles.

The State's Response Brief also cited *State v. Lucas*, which involved the issuance of *Miranda* rights and execution of a written waiver, as more fully-addressed in Petitioner's Brief,

and cited *State v. Holland*, 178 W.Va. 744, 364 S.E.2d 535.(1987), a case in which this Court held that *Miranda* rights did not apply because the accused was not even in custody when the subject inculpatory statements were made.

Accordingly, Petitioner respectfully submits that a consideration of the “totality of the circumstances” of *this* case results in but one conclusion - Petitioner did not make a knowing and intelligent waiver of his right to counsel before making the alleged statements to Sgt. Cox which were admitted at trial. *Oregon*, 462 U.S. at 1046. Therefore, justice demands that Petitioner be afforded a new trial in which the subject statements are excluded.

II. The State acknowledges that W.Va. Code § 31-20-5e is applicable, but has produced insufficient evidence to satisfy its elements.

As evidenced by its Response Brief, the State does not dispute the applicability of West Virginia Code § 31-20-5e and that the statute’s elements must be satisfied before admission of a defendant’s jail calls. Response Brief p. 17, 34, 36. However, the State has nonetheless failed to demonstrate that notice [that calls may be recorded] was prominently placed on or immediately near the telephones used by Petitioner on the dates of the calls admitted into evidence at trial - thus, failing to satisfy § 31-20-5e(3).

In its Response Brief, the State cites this Court’s decision in *State v. Blevins*, 231 W.Va. 135, 744 S.E.2d 245 (2013), for the proposition that because a defendant knew that his jail calls would be recorded, no violation of privacy occurred. Response Brief p. 36. Importantly, however, *Blevins* did not address W.Va. Code § 31-20-5e. In *Blevins* rather, the defendant asserted that recordings of his jail calls were made in violation of his right to privacy, and their admission at trial was unfairly prejudicial in violation of Rule 403 of the West Virginia Rules of Evidence. 231 W.Va. at 150. Seemingly based upon this Court’s reasoning in *Blevins*, the State

argues that

if, for some reason, the warning sign next to a phone Petitioner used on a day in which his call was recorded had fallen down or was otherwise not present, *it would make little difference in determining the admissibility of the phone call provided that the State could show that Petitioner was aware his phone calls were subject to being monitored and recorded.*

Emphasis added, Response Brief p. 36. The State's theory that 'close enough compliance will suffice' is contrary to the explicit requirements of W.Va. § 31-20-5e.

Accordingly, Petitioner respectfully submits that this Court should enforce the provisions of W.Va. § 31-20-5e, find that Petitioner's jail calls were admitted in error, and award Petitioner a new trial.

III. Sgt. Cox's lay opinion testimony regarding the exemplar shoes does not satisfy the W.Va. Rules of Evidence.

In response to Petitioner's argument that Sgt. Cox did not have personal knowledge or perception of Petitioner's shoes on the night in question so as to render a lay opinion at trial, the State suggests that Sgt. Cox *did* have a perception "because he had viewed the videos capturing Petitioner's footwear hundreds of times." Response Brief, p. 38. Very simply, reviewing video evidence after the fact is not the equivalent of "personal knowledge or perception of the facts" necessary to gain admission of a lay opinion pursuant to *State v. Nichols*. 208 W.Va. 432, 541 S.E.2d 310 (1999).

While the State labels the exemplar shoes as "nothing more than demonstrative evidence" (Response Brief p. 38), Petitioner submits that in actuality the shoes and Sgt. Cox's attendant testimony were a backdoor way for the State to introduce unfairly prejudicial and improperly suggestive evidence to the jury, which the State's own experts could not support. As this Court has recognized, the *Nichols* test is "designed to provide 'assurance against the admission of

opinions which would merely tell the jury what result to reach.” 208 W.Va. 440, quoting *U.S. v. Rea*, 958 F.2d 1206, 1215 (2d Cir. 1992).

Petitioner submits that the admission of the exemplar shoes and attendant lay opinion testimony of Sgt. Cox clearly placed the underlying fairness of the jury’s verdict in doubt. Accordingly, Petitioner’s conviction should be reversed and he be awarded a new trial.

CONCLUSION

Petitioner respectfully requests that this Court reverse his conviction and order a new trial excluding the improper evidence outlined in Petitioner’s Brief.

Respectfully submitted,
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Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "PETITIONER'S REPLY BRIEF" was served upon the following counsel of record, by U.S. Mail, on November 18, 2014:

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