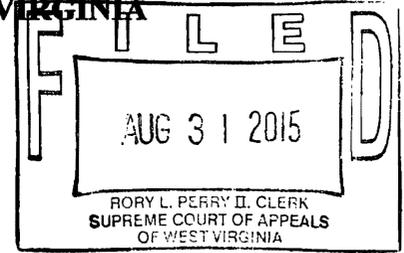


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1037



STATE OF WEST VIRGINIA,

Plaintiff Below, Appellee,

v.

Appeal from a final order
Of the Circuit Court of
Raleigh County (13-F-225)
(Honorable John A. Hutchison)

DONALD DUNN,

Defendant Below, Appellant.

APPELLANT'S REPLY BRIEF

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ASSIGNMENTS OF ERROR

I. THE COURT BELOW ERRED IN DENYING A DEFENSE MOTION FOR A CONTINUANCE OF THE TRIAL AND IN FAILING TO INSURE THE DEFENDANT'S COMPETENCE TO STAND TRIAL WHILE UNDER THE INFLUENCE OF HIGH-POWERED PAIN KILLERS.

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more prejudicial than probative, but since they came as a complete surprise, Dunn was left without a meaningful opportunity to challenge them. According to the state's witness, Larry Warden, Dunn actually made two thousand (2,000) calls at fifteen minutes a pop. (Supp. App. 91).

As argued previously, coupled with the burden on counsel of dealing with seventy hours worth of recorded telephone calls, was Mr. Dunn's undisputed use of prescribed high-powered pain medication. He was administered "Lortab," a high-powered, narcotic pain medication. (App. Vol. I, p 4). As previously noted, without further inquiry, the Court disposed of the motion for a continuance on the issue of Mr. Dunn's possible impairment by reason of the medication essentially based on a finding that "he looks OK to me." The Court stated: "The Court will make a finding that, based upon the Court's observations of the defendant today, that the Court did not observe the defendant to be, in any way, sleepy, non-responsive, and/or he did not appear to the Court, through my own observations, to be impaired today." (App. Vol. I, p 69). The defendant, of course, had sat silently during the hearing, offering little opportunity for evaluation of his state of coherence or impairment.

The State argues that Dunn was not prejudiced by the ruling, waived it, and asserted different grounds in a written motion. These arguments, while facially appealing, are not persuasive. The grounds asserted in the written motion were cumulative, not exclusive, and the other matters arose after the written motion had been filed. How the state could gain traction from an argument that "different grounds" were asserted in the written motion is beyond the pale. Those grounds were sufficient, in and of themselves.

REPLY ARGUMENT

I. THE COURT BELOW ERRED IN DENYING A DEFENSE MOTION FOR A CONTINUANCE OF THE TRIAL AND IN FAILING TO INSURE THE DEFENDANT'S COMPETENCE TO STAND TRIAL WHILE UNDER THE INFLUENCE OF HIGH-POWERED PAIN KILLERS.

The State still offers no excuse for the late disclosure of dozens of hours of telephone calls recorded by the jail authorities while Dunn talked to his mother from the Southern Regional Jail at Beaver.

Again, the prosecutor's very first question to Mr. Dunn on cross-examination was: "You agree that you and your mother have had over 400 telephone calls, while you've been in the Southern Regional jail, since you murdered your father and tried to murder your mother, correct?" (App. Vol. III, p 936).

Meekly, Mr. Dunn replied, "Yes Ma'am."

As heretofore noted, she then proceeded to question him about comments he'd made to his mother on the telephone from jail. Apparently, Mr. Dunn told his mother, "I may as well cost the State as much money as humanly possible" {by going to trial}. (App. Vol. III, p 936). Mr. Dunn explained that his comment was a joke, but it is not difficult to imagine the impact that statement had on twelve Raleigh County taxpayers serving on jury duty.

At another time during one of the more than 400 telephone calls, he allegedly made statements about escaping from prison. (App. Vol. III, p 937). Absent an ability to familiarize himself with the content of the calls, counsel was left without a valid opportunity to assert cogent objections to their use. Obviously, Dunn's comments were

Coupled with the additional grounds asserted at the hearing, there were more than enough compelling reasons to grant a continuance of the trial.

The Court abused its discretion in denying the request for a continuance by reason of the facts and circumstances here. This Court has outlined the factors to be considered in ruling on a motion for a continuance. *In re Tiffany Marie S.*, 196 W.Va. 223, 235, 470 S.E.2d 177, 189 (1996). “A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion.” Syl. Pt. 2 *State v. Bush*, 163 W.Va. 168, 169, 255 S.E.2d 539, 540 (1979).

Counsel was unprepared to deal with the jail telephone call evidence since he had not had a sufficient opportunity to review it prior to trial. Further, we are left to speculate whether the defendant was impaired during all or part of his trial. It is the trial court’s obligation to insure a defendant is competent to stand trial, unimpaired by powerful drugs administered by his captors. *Cf.*, *State v. Chapman*, 210 W.Va. 292, 557 S.E.2d 346 (2001). The far better course would have been to remove the issue entirely by granting a continuance of the trial. The court’s failure to do so was erroneous and prejudiced Mr. Dunn such that a new trial is warranted. Counsel met his obligation by alerting the Court to the issue. It was the court’s obligation to insure Dunn was not impaired. Its failure to do so mandates a new trial.

II. THE COURT BELOW ERRED IN EXCLUDING THE TESTIMONY OF AN EXPERT WITNESS WHO OPINED THAT THE DEFENDANT’S CONDUCT WAS INFLUENCED BY THE CONSUMPTION OF SYNTHETIC MARIJUANA, ERRED IN PRECLUDING EVIDENCE GENERALLY RELATING TO THE SAME, AND ERRED IN RESTRICTING DEFENSE

COUNSEL'S OPENING STATEMENT.

The state argues that the court did not err in excluding the testimony of Charleston Forensic Psychologist Clifton R. Hudson, Ph.D., who examined Mr. Dunn extensively and determined that he was competent to stand trial and that he did not suffer from a mental disease or defect at the time of the offense. However, Dr. Hudson did hold the opinion that Mr. Dunn's admitted use of synthetic marijuana had an impact upon his conduct at the time of the offense. He stated, "...{Y}es, I do believe that it is reasonable to state that the consumption of synthetic marijuana affected his capacity for rational thought at the time of the offense." (App. Vol. I, p 17).

For his part, Mr. Dunn described his heavy use of the over-the-counter legal "marijuana" substances. (App. Vol. III, pp 926-931). Of course, no one really knows what kind of chemicals are utilized by the substance's manufacturer. Mr. Dunn stated the drug gave him a "zombified feeling." (App. Vol. III, p 933).

While the defense here must concede that Hudson's testimony alone is insufficient to support a diminished capacity defense in this case, the testimony should have been admitted for other purposes. *State v. Joseph*, 214 W.Va. 525, 590 S.E.2d 718 (2003). *Cf.*, *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009); *State v. Steele*, 178 W.Va. 330, 359 S.E.2d 558 (1987).

The court below restricted defense counsel's ability to include the defendant's anticipated testimony regarding synthetic marijuana use in his opening statement because the prosecutor objected to any mention of substance abuse until

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The State argues that its use of recordings of Mr. Dunn's private telephone conversations with his mother at trial was harmless, even if error. As noted previously, the accessibility and use of this material implicates a variety of constitutional concerns, including, but perhaps not limited to, his rights to privacy, his Fourth Amendment rights to be secure in his papers and effects, his Sixth Amendment right to counsel, and his Fifth Amendment right against self-incrimination.

The state's failure to lay a proper evidentiary foundation for obtaining and using the telephone materials here is still unexplained. Again, although testimony was adduced asserting that all inmates are given, and sign for, an inmate handbook advising them that all of their telephone calls would be monitored, the evidence failed to establish that *Mr. Dunn* was given said handbook. (Supp. App. 89). The state points to no evidence to establish that required foundation. Certainly, no signature acknowledging receipt by Mr. Dunn was offered in evidence.

As a practical matter, the statute which purports to authorize prosecutors in West Virginia to obtain and use the information, W.Va. Code 31-20-5e affords virtually no restriction on disclosure whatsoever. Thus, it is overly broad.

The process whereby inmate telephone calls are monitored and recorded - and disclosed and used as evidence - is unconstitutional inasmuch as the process violates an

after Mr. Dunn testified, telling the court that the danger of making a “promise too easily not kept” was of overriding concern. In other words, she feared that counsel would represent to the jury on opening statement that the defendant would testify and then not put him on the witness stand. Despite assurances to the contrary, and notwithstanding *strenuous* objection, the Court still precluded defense counsel from making comments on opening statement indicating that Mr. Dunn would testify about his synthetic marijuana use, its impact on him, and its contribution to his behavior at the critical moments which were the subject of the trial.

Thus, Mr. Dunn was precluded from effectively presenting his defense in opening statement - the part of the trial where a case is often won or lost. Counsel was not able to tell the jury the facts of the case that he anticipated proving at trial from the anticipated testimony of the defendant. Surely this ruling cannot comport with due process.

The sole basis for the ruling appears to be that counsel might attribute anticipated testimony to Mr. Dunn which might not then be produced. (Supp. App. 196-202). The state’s remedy for that course is the jury’s subsequent distrust of defense counsel, and competent counsel would never choose such a course. The State offers the court no authority for the idea that counsel must be restricted in his recitation of the facts of the case to be testified to by the defendant on opening statement. The prejudice is overwhelming.

inmate's right to privacy, essentially eviscerates his right to counsel, and renders Miranda meaningless. *Cf. Massiah v. United States*, 377 U.S. 201 (1964). *Massiah* holds that the Sixth Amendment prevents the government from eliciting incriminating statements from a criminal defendant once adversarial proceedings have commenced and the defendant has a lawyer. Recording an inmates telephone calls, disclosing them to the state and permitting their use at trial renders the *Massiah* rules meaningless.

Again, this Court should require a modicum of precautions to prevent the random collection and dissipation of an inmate's private communications. The use of Mr. Dunn's recorded conversations in the matter of instant concern were highly prejudicial, were not probative of any fact in issue in the case, and were simply used to make him look bad. Those circumstances obtain, unfortunately, far too often in the courts of this state.

IV. THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER TWO JURORS ENGAGED IN A HEATED, ANIMATED DISCUSSION IN THE JURY BOX IN OPEN COURT, AND IN FAILING TO MAKE INQUIRY RELATIVE TO THE SAME.

The state attempts to excuse the jury deliberation in the courtroom by asserting that counsel for the state "didn't see it." (She sat with her back to the jury at trial). Again, after the jury reported that perhaps it was hung on the issue of mercy, while all twelve were returned and sitting in the jury box, His Honor left the bench to retrieve a document and during his absence, two jurors engaged in a heated, animated conversation. *Cf., State v. Dellinger*, 225 W.Va. 736,696 S.E.2d 38 (2010).

The defense moved for a mistrial. (App. Vol. III, pp 1131-1133). Counsel called the matter to the court's attention, and the Court should have made inquiry as to the nature and

details of the “deliberations” outside the jury room. However, as noted previously, the Court simply brushed off the matter and made no inquiry whatsoever. (See, Supp. App. 212).

At the very least, Mr. Dunn is entitled to a new trial because all of the deliberations in his case did not occur amongst all twelve jurors - a basic instruction given in every criminal case. The state admits our jurisprudence is devoid of decisional law on this precise issue, but the error should afford Mr. Dunn an avenue to obtain a new trial. The state’s argument that counsel somehow failed to request an inquiry is specious. The court was advised of what had occurred, but failed entirely to investigate the matter.

V. THE COURT BELOW ERRED IN REFUSING A DEFENSE INSTRUCTION OUTLINING FACTORS FOR JURY CONSIDERATION ON THE ISSUE OF MERCY.

Mr. Dunn simply again respectfully suggests it is time to revisit the issue and afford West Virginia juries the benefit of guidance on their consideration of the issue of mercy in appropriate cases. Particularly where, as here, the sole issue for jury deliberation is perhaps whether to afford mercy or to withhold such a recommendation, it is appropriate to instruct jurors by highlighting matters worthy of consideration in reaching a verdict on the issue of whether to grant or withhold mercy.

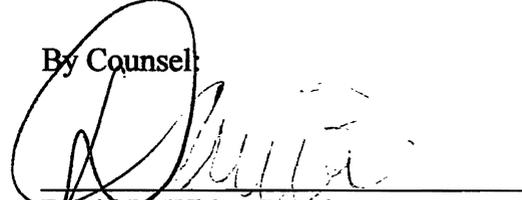
CONCLUSION

Based upon the foregoing, or for reasons otherwise apparent to the Court,

Appellant respectfully prays that the Court will enter an Order directing that this case be remanded with directions to vacate his convictions and award him a new trial.

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CERTIFICATE OF SERVICE

I, David L. White, do hereby certify that I served true copies of the foregoing “Appellant’s Reply Brief” upon counsel for the Appellee, Kristen Keller, Raleigh County, West Virginia, Prosecuting Attorney, by depositing a true copy thereof in the United States mail, first-class postage pre-paid, on this 31st day of August, 2015, addressed to her at 112 North Heber Street, Beckley, WV 25801.



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