

15-0343

B. Bailey

03/27/15

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS.

CASE NO. 13-F-21

JESSE LEE HEATER,  
DEFENDANT.

RE-SENTENCING AND POST TRIAL MOTION ORDER

On the 11<sup>th</sup> day of February, 2015, came the State of West Virginia, by David E. Godwin, Prosecuting Attorney in and for Upshur County, West Virginia, the Defendant, Jesse Lee Heater, and his co-counsel, Brian W. Bailey and G. Phillip Davis, upon all prior proceedings had and taken herein.

The State having asserted in its written response to the Defendant's three post-trial motions and noting that the period for filing an appeal of the re-sentencing of this case on the 15<sup>th</sup> day of October, 2014 has expired in this case, the Court is of the OPINION that the interests of justice are served in this matter by re-sentencing the Defendant to allow him an additional opportunity to file a timely appeal; and further that, upon re-sentencing the Defendant, take up and consider the merits of the Defendant's Motion in Arrest of Judgment, the Defendant's Motion for Post-Verdict Judgment of Acquittal, and the Defendant's Motion for New Trial.

Thereupon, the Court stated that it had considered the written report of the Pre-Sentence Investigation previously prepared and submitted by Serena R. Peterson, Probation Officer for the 26th Judicial Circuit of the State of West Virginia, including its findings and recommendations, which Pre-Sentence Investigation report was previously FILED in the record of this case by the Court.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgment and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's plea of guilty and conviction of the offense of First Degree Murder, a felony, in manner and form as the State of West Virginia has charged in the First Count of said Indictment, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Jessie Lee Heater, be confined and imprisoned in the Mount Olive Correctional Complex situate in Mount Olive, in Fayette County, West Virginia, for the rest and remainder of his natural lifetime with no recommendation of mercy, pursuant to the jury not recommending mercy and pursuant to the terms and provisions of Chapter 62, Article 2, Section 1 of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be June 19, 2014, the re-sentencing date shall be February 11, 2015, and the effective date shall be July 24, 2012, thereby awarding 932 days credit for pre-sentencing incarceration.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgment and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's conviction of the offense of Conspiracy to Commit Murder, a felony, in manner and form as the State of West Virginia has charged in the Second Count of the Indictment, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Jessie Lee Heater, be confined and imprisoned in the Mount Olive Correctional Complex situate in Mount Olive, in Fayette County, West Virginia, for an

indeterminate term and period of not less than one (1) year nor more than five (5) years, pursuant to the terms and provisions of Chapter 61, Article 10, Section 31 of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be June 19, 2014, the re-sentence date shall be February 11, 2015, and the effective date shall be upon the completion of his aforesaid sentence on his conviction for First Degree Murder as set forth above.

It is further ADJUDGED and ORDERED that the sentence heretofore imposed upon the Defendant on his conviction on the Second Count of the Indictment shall run consecutively to the sentence imposed upon the Defendant on his conviction on the First Count of the Indictment.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgment and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's conviction of the offense of Concealment of a Deceased Human Body, a felony, in manner and form as the State of West Virginia has charged in the Third Count of the Indictment, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Jessie Lee Heater, be confined and imprisoned in the Mount Olive Correctional Complex situate in Mount Olive, in Fayette County, West Virginia, for an indeterminate term and period of not less than one (1) year nor more than five (5) years, pursuant to the terms and provisions of Chapter 61, Article 2, Section 5(a), of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be June 19, 2014,

the re-sentence date shall be February 11, 2015, and the effective date shall be upon the completion of his aforesaid sentence on his conviction for First Degree Murder as set forth above.

It is further ADJUDGED and ORDERED that the sentence imposed upon the Defendant on his conviction on the Third Count of the Indictment shall run consecutively to the sentences imposed upon the Defendant on his conviction on the First Count and Second Count of the Indictment.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgment and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's conviction of the offense of Conspiracy to Conceal a Deceased Human Body, a felony, in manner and form as the State of West Virginia has charged in the Fourth Count of the Indictment, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Jessie Lee Heater, be confined and imprisoned in the Mount Olive Correctional Complex situate in Mount Olive, in Fayette County, West Virginia, for an indeterminate term and period of not less than one (1) year nor more than five (5) years, pursuant to the terms and provisions of Chapter 61, Article 10, Section 31, of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be June 19, 2014, the re-sentence date shall be February 11, 2015, and the effective date shall be upon the completion of his aforesaid sentence on his conviction for First Degree Murder as set forth above.

It is further ADJUDGED and ORDERED that the sentence imposed upon the Defendant on his conviction on the Fourth Count of the Indictment shall run consecutively to the sentences imposed upon the Defendant on his conviction on the First Count, Second Count and Third Count of the Indictment.

It is further ADJUDGED and ORDERED that the Defendant shall pay to the Clerk of this Court, within two (2) years from the date hereof, the costs of this proceeding as taxed by said Clerk.

A. Thereupon the Court considered the Defendant's **Motion in Arrest of Judgment**. After hearing argument of counsel regarding the Defendant's said motion, the Court found:

1. The Defendant argued that the failure of the State to include one of the co-actors, Rodolfo Villagomez-Correa, in the Indictment that charged the Defendant with the crimes of which he was convicted, violates the mandatory joinder rule contained in West Virginia Rule of Criminal Procedure 8(a). The Defendant contends that the appropriate remedy is the dismissal of the Indictment in this case. The Court found this argument to be without merit.

2. The Court believes that the State is correct in its assertion that Rule 8(a) governs the joinder of counts against one defendant and does not require that the joinder of defendants, and further that the joinder of defendants is governed by Rule 8(b). Rule 8(b) did not require that Rodolfo Villagomez-Correa be indicted in the same charging instrument as the Defendant.

3. Based upon these findings, the Court DENIES and OVERRULES the Defendant's Motion in Arrest of Judgment.

B. Thereupon the Court considered the Defendant's **Motion for Post-Verdict Judgment of Acquittal**. After hearing argument of counsel regarding the Defendant's said motion, the Court found:

1. The basis of the Defendant's motion is an attack on the credibility of prosecution witnesses and the lack of physical or scientific evidence.

2. The Court finds that the jury had a full opportunity to consider the all of the witnesses' credibility and whether the State presented sufficient evidence to support its finding of guilt. The Defendant has not raised any information or issue in his presentation of his motion that would justify the requested remedy.

3. Based on these findings, the Court DENIES and OVERRULES the Defendant's Motion for Post-Verdict Judgment of Acquittal.

C. Thereupon the Court considered the Defendant's **Motion for New Trial**. After hearing argument of counsel and the sworn testimony of Chief Deputy Virgil Miller regarding the Defendant's said motion, the Court found:

1. The Defendant in his Motion asserts a variety of errors including that: a) his trial counsel did not proffer any defense of Mr. Heater; b) his trial counsel did not move for a mistrial; c) his trial counsel did not ask for a change of venue; and, d) that the Court refused to appoint a different attorney to represent him.

2. The Defendant in his motion fails to represent what defense he believed should have been introduced by the trial counsel. Nor does he assert any grounds for a mistrial or change of venue. The matter of appointed counsel is committed to the sound discretion of the Court. The Defendant does not aver any facts that would support a finding that the Court

abused its discretion.

3. The Defendant asserts the failure of the defense counsel to obtain a polygraph examination of the Defendant with investigative funds that had been allocated for investigation. This assertion is without any merit.

4. The Defendant asserts that he was not given the opportunity at a suppression hearing to challenge whether any of the State's evidence was illegally seized in the case. However, the Defendant does not aver that any evidence was obtained in violation of his 4th Amendment rights. As pointed out by the State, none of the State's evidence admitted in the trial was seized from the Defendant. The record in this case indicates that the defense counsel did challenge the State's evidence, such as: a) defense counsel, by Motion in Limine, challenged the admissibility of the gun that the State eventually put into evidence; b) defense counsel raised the issue of excluding any mention of the investigation into the disappearance of Luke Stout [in which some believed the Defendant was involved.]; the Court directed that the matter concerning Mr. Stout's disappearance was not relevant and directed both sides to avoid any mention of the matter; c) defense counsel negotiated with the prosecutor to avoid the use of inflammatory photographs; d) defense counsel argued a Motion in Limine to suppress the testimony of Ms. Bridgette Siron, and was able to get a helpful clarification of the parameters of her direct and cross examinations; and, e) defense counsel unsuccessfully argued a Motion in Limine to suppress the testimony of Mr. William Tenney.

5. The Defendant further asserts in his Motion that the testimony of the co-actor Rodolfo Villagomez-Correa is now available, was not available before the trial, and is newly discovered evidence that justifies a new trial. Whether the testimony is actually available

was not established. Mr. Villagomez-Correa is a convicted person represented by counsel. However, the Court knows from the response of the State and from the Court's involvement in Mr. Villagomez-Correa's sentencing that his testimony does not exculpate the Defendant.

6. The Defendant asserts that the State's failure to call a confidential informant to testify was error. The State had no obligation to call the witness, the Defendant knew of the witness and his statement prior to trial, the witness was not exculpatory of the Defendant, and the defense counsel was able to use certain aspects of the witness' statement to cross examine an important prosecution witness. The Court found no error.

7. The Defendant in his motion raised an issue based upon an allegation that the family of a missing person, Luke Stout, tainted the fairness of the Defendant's trial by allegedly displaying an inflammatory protest sign to the jury. The Court after considering the sworn testimony of Chief Deputy Sheriff for Administration Virgil D. Miller, the record of the case, and the representations of counsel for the Defendant and the State, found that there was no prejudice to the Defendant in regard to this matter. There is no evidence that the jury saw anything that would be prejudicial to the Defendant. The presiding trial judge took adequate steps to insure that the trial was not influenced by the actions of the Stout family.

4. Based on these findings, the Court DENIES and OVERRULES the Defendant's Motion for New Trial.

The Defendant's exceptions to the Court's rulings on the three post-trial motions are hereby noted.

Thereupon, the Court permitted the Defendant to address the Court directly regarding some issues he believes should be addressed. In the Defendant's remarks he described his

relationship with his trial attorney and his discontent with a number of decisions made by the trial attorney. After hearing and considering the Defendant's statements, the Court is of the opinion that the matters raised by the Defendant are matters of trial tactics or are matters that should be addressed by the appellate Court. Accordingly, the Court will take no action or make any ruling on the matters raised by the Defendant personally.

It is further ADJUDGED and ORDERED that the Defendant be and he is hereby committed to the custody of the Warden of the Mount Olive Correctional Complex situate in the City of Mount Olive, in Fayette County, West Virginia, to serve the sentence heretofore imposed upon the Defendant, and the Defendant be and he is hereby remanded to the custody of the Sheriff of Upshur County, West Virginia, to be by the latter placed in the North Central Regional Jail, situate in Doddridge County, West Virginia, until such time as the Defendant is transported and delivered to the custody of the Warden of the Mount Olive Correctional Complex, as aforesaid.

It is further ADJUDGED and ORDERED that the Clerk of this Court make and prepare certified copies of this Order, to be sent by United States Mail to the following parties:

1. David E. Godwin, Prosecuting Attorney, 38 W. Main St, Room 202, Buckhannon WV 26201;
2. Brian W. Bailey, Counsel for the Defendant, 25 W. Main Street, Buckhannon, WV 26201;
3. G. Phillip Davis, Counsel for the Defendant, Post Office Box 203, Arthurdale, WV 26520
3. Upshur County Sheriff's Department, 38 West Main Street, Buckhannon, WV

26201;

4. North Central Regional Jail, #1 Lois Lane, Greenwood, WV 26415

(Fax No. 304-873-2803);

5. WV Division of Corrections, 1409 Greenbrier St., Charleston, WV 25311;

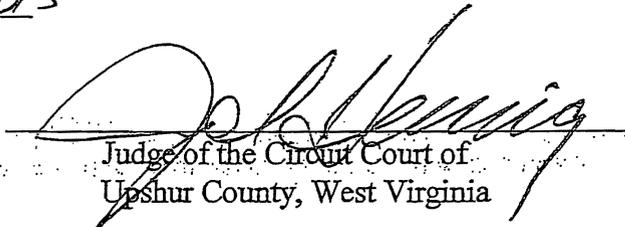
which said copies shall constitute adequate, sufficient and legal notice of all matters had and taken herein.

UPSHUR COUNTY

DOB: 09/13/1983

ORDER ENTERED: March 27 2015

02-3/27/15  
As listed

  
Judge of the Circuit Court of  
Upshur County, West Virginia

UPSHUR COUNTY, W.V.  
FILED  
2015 MAR 27 A 10:11  
BRIAN GAUDET  
CIRCUIT CLERK

ATTEST: A true copy from the records located in the office of the Clerk of the Circuit Court of Upshur County, West Virginia.

Given under my hand

3/27/15  
BRIAN P. GAUDET, CLERK  
