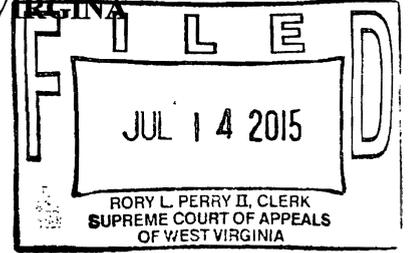


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 15-0405



**APPEAL BRIEF OF OSCAR COMBS, SR.
For Mercer County Circuit Course Case No.
14-F-141-DS**

STATE OF WEST VIRGINIA v. OSCAR COMBS, SR.

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Court Rules

Rule 21, W.Va. Rules of Crim. Proc.

I. ASSIGNMENTS OF ERROR

- 1) The lower court erred in denying Appellate's Motion for Judgment of Acquittal when the State failed to properly identify the body in its case in chief.
 - 2) The lower court erred in denying Appellate's Motion for Change of Venue.
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II. STATEMENT OF THE CASE

Oscar Combs, Sr. was indicted in Mercer County, West Virginia for the murder and robbery of James Pascal Butler and for conspiracy by the June, 2014 Term of the Mercer County Grand Jury, along with two co-defendants - his son, Oscar Combs, Jr. and his wife, Linda Combs. Oscar Combs, Jr. (referred throughout the trial and hereinafter simply as "Junior") pleaded guilty to first degree murder and was sentenced to life with mercy. Mrs. Combs was given immunity in exchange for anticipated testimony. The case was tried to a jury on January 6, 7 and 8, 2015. Mr. Combs was found guilty of first degree murder, robbery and conspiracy. The jury did not recommend mercy on the murder charge and the trial court ran his sentences consecutively.

Mr. Butler disappeared on his way to work on or about April 4, 2011. He was traveling to Pineville, West Virginia from his home in the Hinton/Pipestem area. On or about April 22, 2011, a body was discovered in a rural area of Wyoming County, West Virginia. The discovery of the body, the condition of the body, and the injuries to, and death of this body would become a central theme of the State's case against Mr. Combs. The State claimed repeatedly throughout the trial that the body was that of Mr. Butler. Even though the body was clearly in an advanced state of decay and could not be visually identified, and despite making his body a central element in its case against Mr. Combs, the State never introduced any testimony to prove that the body was that of Mr. Butler.

The State relied, for identification purposes, on the testimony of two witnesses – Dr. Nabila Haikal, formerly of the Office of the Chief Medical Examiner, and Oscar Ross

Combs, Jr. The record establishes that Dr. Haikal did not perform any analysis to identify the remains in question. That was done by “law enforcement” based on fingerprints obtained from the body. Dr. Haikal only testified about the cause of death. The identification of the body was done by an unnamed member of “law enforcement” that the State did not bother to call as a witness. Oscar Combs Junior was also unable to identify the body or the person he shot, because he testified, without contradiction, that he had never met Mr. Butler. Having never met him, he could not (and did not) testify about the identity of either the person he shot or of the body discussed in the State’s case.

Prior to trial, due to widespread media coverage, Appellate moved for a change of venue, which was denied. He then retained the services of the Jackson Group, which conducted a telephone survey of potential jurors, upon which Appellate relied in his motion.

III. SUMMARY OF THE ARGUMENT

A. The State was required to prove the identity of the deceased. The identity of the deceased is an essential element of the crime of murder. While the State devoted a great deal of its case in chief to the discovery of and cause of death of a body found a few weeks after the date of the alleged crime, the body found was in such an advanced state of decomposition that it could only be identified through fingerprint analysis. Thus, not only was the State required to prove the identity of the body that was the centerpiece of its case, but was required to do so through the introduction of expert testimony. Such testimony was apparently available to the State but no such witness was called. As the State rested without even attempting to prove this essential element of its case, Defendant's conviction should be reversed.

B. Appellate's Motion for a Change of Venue should have been granted due to the potential preconceptions of guilt throughout the community.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellate contends that the facts and legal arguments are adequately presented in the briefs and the record on appeal, and the decision process would not be significantly aided by oral argument.

V. ARGUMENT

A. Appellate's Motion for Judgment of Acquittal should have been granted due to the State's failure to identify the deceased.

The State presented its case simply and concisely, calling the following witnesses:

Tommy Joe Thomas, who found the body in question; Trooper Chris Wade, the State Trooper in charge of the crime scene where the body was found; Trooper Andre Palmintieri testified as to the chain of custody of certain firearms evidence; Todd Grey of the Mercer County Assessor's Office testified as to the location of the boundary between Mercer and Wyoming Counties; Dr. Nabila Haikal of the Office of the Chief Medical Examiner, who performed an autopsy on the body and testified as to the cause of death; Calissa Carper, of the West Virginia Crime lab, as to the possibility that certain recovered weapons fired the bullet fragment that was recovered from the body; Oscar Ross Combs, Jr.; and Retired Trooper Anthony Reed, the lead investigator in the case. None of these people identified or attempted to identify the recovered body as that of James Butler.

The State called Tommy Joe Thomas as its first witness. Mr. Thomas testified briefly, stating that "I found a body." (*see* Appendix, p. 470) He was asked if he recognized the body and he stated "No." (Appendix, p. 472)

The State then called State Trooper Chris Wade. Trooper Wade works with the West Virginia State Police Crime Scene Team and described his work in responding to and securing the scene. He stated that the body was decomposing and that "It wasn't like looking at a picture of somebody where you could say well definitely that's so and so. *It wasn't readily identifiable.*" (Appendix, p. 478, *emphasis added.*) He also stated that they did not find anything on the body that would identify it as to who it was. (Appendix, 480.)

The State then called Trooper Andre Palimintieri, Detachment Commander of the Jesse (Wyoming County) detachment of the West Virginia State Police. Trooper Palimintieri's function during the trial was to discuss the chain of custody of three items of evidence - a handgun described by Trooper Palimintieri as a ".22 caliber pistol", a cast of the barrel of the same pistol, and a bullet fragment identified as "bullet fragment taken from the victim." (Appendix, pp. 487-88). Trooper Palimintieri was not asked to identify the body in question and he did not offer any testimony in that regard.

The State then called Todd Gray, employed with the Mercer County Assessor's Office. Mr. Gray offered testimony as to the location of the boundary of Mercer and Wyoming Counties and no testimony as to the identity of the victim.

The State then called Dr. Nabila Haikal. Dr. Haikal was, at the time of the investigation into this crime, employed as a medical examiner with the Office of the Chief Medical Examiner in Charleston. Although no witness had yet identified the body in question as that of Mr. Butler, Dr. Haikal was asked: "Did you reach an opinion as to the cause of death of James Bo Butler?" (Appendix, p. 543). She responded that she had and that her opinion was that the cause of death was "gunshot wound of the head."

(Appendix, p. 543). Dr. Haikal was then asked about how the body was identified:

Q. Now we've been talking about this as James Bo Butler. How is it that you were able to identify the body you worked on in April of 2011 as that of Mr. Butler?

A. In spite of decay there was still persistent finger pads that were feasible to print and to compare with his James Butler's fingerprints before death.

(Appendix, p. 549). This testimony suggests that Dr. Haikal herself performed a fingerprint analysis and was offering *an opinion* that the results of that analysis demonstrated that the body was that of Mr. Butler. On cross examination, however, she made it clear that that work was done by someone else:

Q. Doctor, you said the body — that you identified the body through fingerprints.

A. We submitted the fingerprints, and the identification through fingerprint comparison is done by law enforcement.

Q. Okay. So law enforcement provided the valuable information, the identity of the victim.

A. Yes. *They did the comparison and provided us with a confirmation.*

(Appendix, p. 550, *emphasis added*)

The State also called Calissa Carper, of the West Virginia Crime Lab, who testified about the ballistics evidence, but not about the identity of the body in question.

Ms. Carper conceded that the handgun admitted into evidence “might be the murder weapon, might not be.” (Appendix, p. 571).

The State then called Oscar Ross Combs, Jr. (“Junior”) Junior is the son of the Defendant, Oscar Ross Combs, Sr. Junior claimed in his testimony that on April 4, 2011, he was sleeping at about 3:30 or 4:00 in the morning when his mother (Linda Combs, originally a co-defendant and subsequently given immunity in exchange for testimony that she was never called upon to give) came in and woke him up (Appendix, p. 580), and that he then got dressed. He stated that the Defendant and his mother came into the living room where he slept and that “my mom was behind him with the weapons”, a .22 caliber revolver and a shotgun (Appendix, p. 582). He did not believe at that time that this was cause for concern (Appendix, p. 584). Junior claimed that they drove from their home in Wyoming County across the mountain to the Mercer County side, turned around, went back up the mountain a little bit, and pulled off the road (Appendix, p. 584). He stated that the Defendant then “produced a gun out of his pocket” (Appendix, p. 585) and “Stuck it in my side” and “...told me that his ideal (*sic*) was for me to shoot Mr. Butler.” (*see* Appendix, p. 586), Junior emphasized that *he had never met Bo Butler* (Appendix, p. 586). He claimed that the Defendant then said “that I was going to shoot Mr. Butler or

else.” (see Appendix, pp. 586-87). Junior stated that Mr. Butler exited his vehicle and came up to the back of the vehicle that Junior and the Defendant were riding in, and received some cable clamps from the Combs vehicle. Junior claims that he walked up behind Mr. Butler as Mr. Butler was placing the clamps in the bed of his truck, and that he felt the Defendant’s gun in his side, and he walked up behind Mr. Butler and “just raised the gun and pulled the trigger.” (Appendix, p. 588). He claimed that he left and that the Defendant dumped the body.

Junior stated on two occasions that he had never met Mr. Butler. Since he had not met Mr. Butler, he could not *and did not* offer testimony as to either the identity of the man he shot or the identity of the body around which the State built its case. The Prosecuting Attorney referred to the victim as Mr. Butler but Junior never confirmed that the victim was Mr. Butler, because he had never met him. Junior also stated that the Defendant had disposed of the body while he had returned to the Combs home for a gas can. He was thus unable to testify as to the location of the disposal of the body, and thus can’t connect the crime he describes with the remains found by Mr. Thomas. (see Appendix, pp. 591-92):

Q. Did you help him unload the body?

A. No sir, when I showed back up he was already on that second gas well road, and when I got the gas — when I put the gas in Mr. Butler’s truck, the bed was gone — I mean the bed was empty. The body was gone.

Thus, the testimony of the witnesses as to the identity of the body around which the State built its entire case was that a) the body “wasn’t readily identifiable”, b) the body could be identified solely through fingerprint analysis; and c) fingerprint analysis was performed by “law enforcement” and the results of that analysis provided to the Office of the Chief Medical Examiner. The State never introduced any testimony as to the actual

identity of the body in question and thus did not even prove or attempt to prove that the body found by Mr. Thomas was James Bo Butler or was even the victim of the murder described by Mr. Combs, Jr.

The identity of the deceased is an element of *corpus delicti*. This Court has held that “To prove the corpus delicti in a case of homicide, two facts must be established: (1) the death of a human being and (2) a criminal agency as its cause.” Syllabus Pt. 4, *State v. Garrett*, 466 S.E.2nd 461, 195 W.Va. 630 (1995). In this case, the Defendant was indicted for, and ultimately convicted of, the murder of James Paschal Butler. The State was required to prove that James Paschal Butler was dead. Having attempted to prove Mr. Butler’s death through the introduction of evidence that a body was found and that the person found died as a result of a gunshot wound to the head, it was incumbent upon the State to prove that the remains so found were the remains of James Paschal Butler. “In any case of homicide there must be proof of the identity of the deceased and the causation of death.” *State v. Myers*, 298 S.E.2d 813, 171 W.Va. 277 (W.Va., 1982). *See also State v. Jenkins*, 229 W.Va. 415, 729 S.E.2d 250 (W.Va., 2012).

This Court considered this issue as early as 1885, in the case of *State v. Flanagan*, 26 W.Va. 116 (1885). In that case, the remains of the victim, alleged to be Ms. Frances Summerfield, had been partially consumed in a house fire. The Court commented at length about the necessity of proving the identity of the deceased:

The first great fact to be established in this case, without full proof of which no rightful conviction could be had is, that Frances Summerfield is dead; for a conviction of murder is never allowed to take place until the body has been found or there is equivalent proof of death by circumstantial evidence to that result. *The finding of the remains of a dead body, is not equivalent to finding the body of the person alleged to have been murdered, unless the remains be identified by full proof, which may also be supplied by direct or circumstantial evidence; for unless the*

remains be so identified, the party supposed to be dead may still be alive. Many lamentable instances in the history of judicial proceedings have occurred, where innocent persons have been tried, condemned and executed, for the murder of persons who suddenly disappeared and who afterwards were ascertained to be alive. Sir Matthew Hale on account of these cases says: "I will never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found. 2 Pis. Or. eh., 39; Wills Circum. Ev. 207.

State v. Flanagan, 26 W.Va. 116, 134 (W.Va., 1885) (emphasis added).

In *State v. Roush*, 120 S.E. 304, 95 W.Va. 132 (W.Va. 1923), the Court emphasized that the *corpus delicti* must be fully proven:

The text books and decisions are all in accord that the corpus delicti must be established by clear, full and convincing evidence. Wharton Grim. Ev. sec. 633; Johnson v. Commonwealth, 29 G-rat. 811; State v. Flanagan, 26 W. Va. 117; State v. Hall, 31 W. Va. 509; State v. Parsons, 39 W. Va. 466; State v. Merrill, 72 W. Va. 500; Goldman v. Com., 100 Va. 625; Smith v. Com., 21 Grat. 809; Gray v. Com., 101 Pa. St. 380; Com. v. York, 9 Metcalf 93. The rule requiring the fullness of proof required is well stated in the 6th pt. Syl. in State v. Flanagan, 26 W. Va. as follows: "It is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the corpus delicti either by direct evidence or by cogent and irresistible grounds of presumption.

State v. Roush, 120 S.E. at _____. 95 W.Va. at 143-144. The Court concluded that "We are not quick to disturb verdicts in such cases" but that "...we cannot retreat behind the sanctity of a verdict and hold it up as a shield to protect our conscience."

In *Garrett*, the direct issue was the propriety of the admission of testimony by the Medical Examiner, Dr. Sopher, as to the cause of death. The body of the victim, Linda Carpenter, was found long after her death and Dr. Sopher had examined skeletal remains. Dr. Sopher opined both as to the cause of death and as to the identity of the remains. As to the identity of the victim:

Dr. Sopher testified that the skeletal remains presented to him for examination were those of the victim in this case, Linda Lou Carpenter, based upon examination of the skeletal remains, which he determined to be those of a white female, approximately 45 years old and between 5'4" and 5'6" tall. Dr. Sopher considered these physical findings, which were strikingly similar to the victim's physicalities, as well as dental information and the clothing and jewelry found on and around the skeletal remains.

Garrett, 466 S.E.2nd at 487, 195 W.Va. at 636. The Court concluded that the recovered skeletal remains "were sufficiently proven to be those of the victim..." 466 S.E.2nd at 491, 195 W.Va. at 640. In support of this conclusion, the Court stated that the evidence presented at trial included the following

Dr. Sopher's testimony that the physicalities of the recovered skeletal remains and the reported description of the victim were strikingly similar in terms of height, weight and age. Furthermore, according to the testimony of the victim's husband and sister, the clothing found on and near the skeletal remains were likewise similar to those owned and worn by the victim. Finally, like the recovered remains, the victim had two lower teeth extracted when she was a child.

Id. The Court found that this evidence "...sufficiently established the identity of the victim to be that of Linda Lou Carpenter." *Id.*

No such evidence was introduced or even attempted to be introduced at the trial of this case. Instead, the State established conclusively that the remains found by Tommy Thomas could not be identified through visual recognition, and that fingerprint analysis was required to prove the identity of the body. While perhaps the State could have called a witness from "law enforcement" to testify as to the fingerprint analysis of the victim and the results thereof, it elected not to. It also did not call any witness who claimed to have identified the body through visual recognition, physical characteristics, clothing, dental records, or identifying marks. The state entirely omitted the identity of the victim from its case.

The last witness called by the State was Retired West Virginia State Trooper Anthony Reed. Trooper Reed was the lead investigator in this case. Trooper Reed was well acquainted with Mr. Butler and his family, testifying that "I've known the family for years" and that he had personally known James Butler for the "Majority of my life." (*see* Appendix, p. 637). Despite his life-long familiarity with Mr. Butler, Trooper Reed was not called upon, during his testimony, to identify the remains found by Mr. Thomas. Trooper Reed participated in the arrest of Mr. Combs, and had taken a recorded statement from him. The statement itself was played for the jury, and the transcript of the statement was introduced into evidence.

Following the conclusion of the State's case, Defense counsel moved for a judgment of acquittal, on the grounds that "State failed to establish the positive identity of the body that was found." (Appendix, p. 695). In response, the Prosecuting Attorney mischaracterized (albeit unintentionally) the testimony of Dr. Haikal, arguing to the Court that "She was able to identify the body by raising fingerprints." (*see* Appendix, p. 696). Defense counsel replied that "She (Dr. Haikal) did not analyze the fingerprints, there's no DNA testimony, there's no dental records, there's no witness identification. There's not a single shred of evidence that the body that was examined by the medical examiner was Mr. Butler." The State also argued that Junior testified that the man he shot was Mr. Butler, when, as has been shown, Junior had not met Mr. Butler and thus had no idea who the victim was.

Unfortunately, the Court also misheard Dr. Haikal's testimony, indicating in response to the Defense motion that "I heard her, I thought, say that she had identified him as that person, based on the fingerprints that she got." (*see* Appendix, p. 700). As

shown by the record, neither Dr. Haikal nor any other person ever testified that the human remains around which the State built its case were the remains of Mr. Butler.

B. The lower court erred in failing to grant the Appellant's Motion for a Change of Venue.

On August 12, 2014, Petitioner's counsel filed a motion for change of venue, pursuant to Rule 21 of the West Virginia Rules of Criminal Procedure. Thereafter, on November 6, 2014, the trial court denied the motion but indicated that it would revisit the issue following testimony from Petitioner's venue expert, the Jackson Group. By order dated November 7, 2014, the trial court authorized special case-specific juror questionnaires be prepared by Petitioner's counsel for submission to jurors during jury orientation. The questionnaire, (*see* Appendix, pp. 128-31) made inquiry into potential jurors' knowledge of the facts of this case. A total of 126 jurors attended orientation with several being excused for unrelated causes. At least seven were stricken from this case by agreement between the State and Petitioner's counsel based on their responses to the questionnaire.

On the morning of trial, 86 jurors appeared in five separate jury panels, from which the jury of twelve, plus two alternates was selected. During individual *voir dire*, at least one other juror was removed due to knowledge about the case through media reports (*see* Appendix, pp. 358-60).

According to Petitioner's venue expert, more than one-half of all adults in Mercer County (53.7 percent) had knowledge of Mr. Combs' case. (*see* Public Perception Survey, Appendix, pp. 51-126).

The West Virginia Supreme Court of Appeals has held that “[t]he fact that a jury free from exception can be impaneled is not conclusive, on a motion for change of venue, that prejudice does not exist, endangering a fair trial. . .” (*see State v. Dandy, 151 W. Va. 547, 564 153 S.E.2d 507, 516 (1967)*). In the instant case, good cause to change venue was established by a public opinion survey performed by the Jackson Group, reflecting that of the 315 adult residents of Mercer County polled, all of whom were presumably potential jurors, 51.1 percent had knowledge of the case through the news media. Further, nearly 16 percent with knowledge of the case had actually discussed it with others, while 13.7 percent had already formed opinions about the case and of those, 11.1 percent believed Mr. Combs guilty.

The instant case garnered extensive media attention in both the local newspaper and on television, due in part to the complicated family dynamics – a mother, father and son charged with the murder. Further prejudicing Petitioner was the fact that his son, “Oscar Ross Combs, Jr.,” gained attention by pleading guilty, which likely caused an unfair association in the minds of potential jurors due to their shared names. As a result, there was likely hostile sentiment present in the community which prevented the Appellant from receiving a fair trial despite the extraordinary steps the trial court took in the days and weeks leading up to trial.

This Court addressed a similar venue issue in *State v. Blevins, 231 W.Va. 135, 744 S.E.2d 245 (2013)*, recognizing that the decision to change venue rests in the sound discretion of the trial court. Here, as in *Blevins*, special interrogatories were utilized, given the unique circumstances of this case, and appellant there contended that failure to

grant Petitioner's motion to change venue was an abuse of that discretion. This Court rejected that argument.

Nevertheless, in regard to the existence of hostile sentiment against a defendant, this Court has said that "influences, even though silent, may so permeate a community as to make their impression upon the jury, and thus endanger the chances of a fair and impartial trial." *State v. Weisengoff*, 85 W. Va. 271, 278 (1919). Furthermore, this Court has stated that "[f]ew juries can be found who are willing to defy public sentiment by rendering an unpopular verdict, especially in a doubtful case, and a fair trial entitled the accused to the benefit of all doubt." (*Id.*) Also, this Court has noted that "[t]he depth and extent of such prejudice can never be known from surface indications, but it may secretly extend to the bounds of the county through sympathy." *State v. Manns*, 48 W.Va 480, 481 (1900); (*see also*, *State v. Derr*, 192 W. Va. 165, 451 S.E. 2d 731 (1994).

In the instant case, of the 126 potential jurors who attended orientation for that particular term of Court, approximately 40 were eliminated from consideration prior to the start of the trial based on their responses to the case-specific juror questionnaire and other unrelated reasons, thereby significantly reducing the number of potential jurors remaining to empanel for trial in this matter.

Appellate herein contends that he has met his burden of proving the existence of a hostile sentiment based on the results of the Jackson Group's survey and respectfully prays that the verdict be set aside.

VI. CONCLUSION

In light of the foregoing, Appellate respectfully prays that this Court grant the relief sought herein and set aside his conviction and remand the case back to the lower court to grant his Motion for Judgment of Acquittal; in the alternative, remand this case back and grant him a new trial in a different venue.

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