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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

34158

MICHAEL S. HUTZLER,

Defendant-Appellant,

v.

STATE OF WEST VIRGINIA,

Plaintiff-Appellee.

APPELLANT'S BRIEF

Appeal from Circuit Court of Berkeley County, West Virginia

Case No. 07-F-69
Honorable Gray Silver, III

Kevin D. Mills
State Bar No. 1252
Mills & Wagner, PLLC
1800 West King Street
Martinsburg, West Virginia 25401
(304) 262-9300
Counsel for Defendant-Appellant

FILED
AUG 22 2008
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

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ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

1. Did the Circuit Court abuse its discretion in finding that the instant prosecution did not place Mr. Hutzler in double jeopardy?

2. Did the Circuit Court abuse its discretion in finding that Mr. Hutzler was entitled to no remedy, even though the State had violated his due process rights when the State destroyed exculpatory blood evidence taken from the crime scene?

3. Did the Circuit Court abuse its discretion when it failed to make a factual finding as to which of the contradictory affidavits was more reliable?

STATEMENT OF THE FACTS

On October 16, 2005, Trooper M.J. Glende charged Defendant-Appellant, Michael S. Hutzler in the Jefferson County Magistrate Court with the following offenses: Burglary, 05-F-432; Grand Larceny, 05-F-433; Domestic Assault, 05-M-3503; Assault, 05-M-3504; Possession of Cocaine, 05-M-3505; False Information to West Virginia State Police, 05-M-3506; and Destruction of Property, 05-M-3507. These charges arose out of an incident that was alleged to have occurred on October 16, 2005 in Jefferson County, West Virginia.

On April 4, 2006, a preliminary hearing was held on the aforementioned charges in the Magistrate Court of Jefferson County, West Virginia before the Honorable William E. Senseney, Magistrate. Defendant was present and represented by counsel, Harley O. Wagner of Mills & Wagner, PLLC. The State was represented by Steve Groh, Jefferson County Assistant Prosecuting Attorney. Trooper M.J. Glende and the alleged victim, Sharla K. Hollida were also present.

On April 4, 2006, after extensive plea negotiations, the parties entered into an agreement to resolve all charges against Mr. Hutzler. Mr. Hutzler pled guilty pursuant to the plea agreement. The Assistant Prosecuting Attorney, the alleged victim, and the arresting officer, Trooper Glende were all in agreement with the final disposition.

The final plea agreement was as follows:

> Defendant pled guilty to the misdemeanor offenses of Domestic Assault, 05-M-3503, and Assault, 05-M-3504.
>
> Defendant was sentenced to six months imprisonment on each charge, with each sentence running consecutively and suspended in lieu of six months unsupervised probation per charge for a total of one year unsupervised probation.

> Standard terms and conditions of probation applied with the additional provisions of $5,000 restitution to the victim, Sharla K. Hollida to be paid within 90 days and no contact with either the alleged victim, Sharla K. Hollida or her boyfriend, Clyde Campbell.
>
> The remaining charges, Burglary, 05-F-432; Grand Larceny, 05-F-433; and Destruction of Property, 05-M-3507; Possession of Cocaine, 05-M-3505; and False Information, 05-M-3506, were agreed to be dismissed. The dismissal was understood by the Defendant-Appellant to be with prejudice.

Pursuant to the plea agreement reached in the Magistrate Court of Jefferson County, West Virginia, the remaining charges were dismissed by Assistant Prosecuting Attorney Steve Groh. On the disposition sheets of the remaining charges, including Burglary, Grand Larceny, and Destruction of Property, a notation was included that the charges were "dismissed per plea." Furthermore, the Motion to Dismiss filed by the State and signed by Assistant Prosecuting Attorney Steve Groh and the alleged victim contained reference to all of the charges with the notation "per plea."

On March 28, 2007, the parties appeared in the Magistrate Court of Jefferson County, West Virginia before Honorable William E. Senseney on the above referenced plea agreement for a status hearing on Mr. Hutzler's probation. Defendant appeared in person and by counsel, Harley O. Wagner. The State was represented by Larry Crofford, Assistant Prosecuting Attorney. At this hearing, the Magistrate Court discharged Mr. Hutzler from probation due to his successful completion of the terms and conditions of probation as set forth in the plea agreement. The Probation Discharge Order stated that:

> the Court finds that the Defendant has complied with all the terms of his probation and all conditions set forth at the hearing in this matter on April 4, 2006 wherein the Defendant, per plea agreement with the State of West Virginia, pled guilty to domestic assault (05-M-3503) and assault (05-M-3504) and the charges of burglary (05-F-432), grand larceny (05-F-433), possession (05-M-3505), false information (05-M-3506), and destruction of

property (05-M-3507) *were dismissed, per said plea with the State.* (Probation Discharge Order) (emphasis added).

The Magistrate Court further noted that the Defendant-Appellant had paid full restitution to Sharla K. Holliday in the amount of $5,000 and that the Defendant-Appellant had not had any further contact with either the alleged victim or her boyfriend. The restitution amount was based upon the monetary value of the victim's property that was allegedly stolen or destroyed by the Defendant-Appellant, with the net value being close to $5,000.

To all parties involved, including Mr. Hutzler, the matter involving this incident appeared to be concluded and the case closed.

However, in February 2007, Berkeley County Prosecuting Attorney Pamela Jean Games-Neely presented the Berkeley County Grand Jury with a three count indictment against Michael S. Hutzler, charging Burglary, Grand Larceny, and Destruction of Property. The Berkeley County Grand Jury returned an indictment against the Defendant-Appellant for the aforementioned charges under Berkeley County Circuit Court Case No. 07-F-69. It is undisputed that this indictment arose out of the same identical fact and circumstances that gave rise to the charges and the plea agreement that Defendant-Appellant had previously entered into and resolved in the Magistrate Court of Jefferson County, West Virginia.

At arraignment on March 5, 2007, Mr. Hutzler entered a plea of not guilty to the indictment. On March 20, 2007, defense counsel Betsy K. Giggenbach met with Assistant Prosecuting Attorney Greg Jones for a discovery conference and plea negotiations. The parties discussed all of the facts and circumstances surrounding the original Jefferson County case as well as the pending Berkeley Count case. Defense counsel shared with the Assistant Prosecuting

Attorney copies of the Jefferson County Case Disposition sheets for the offenses of Grand Larceny, Burglary, Possession of Cocaine, False Information, Destruction of Property, Domestic Assault, and Assault wherein it was noted that said charges were "dismissed per plea." The Assistant Prosecuting Attorney stated to defense counsel that "the defendant deserves to be punished for the crime he committed and that he must plead guilty to a felony offense because what do I have to lose by going to trial- I have your client's confession." Accordingly, the parties were unable to reach a mutual resolution of the case.

The State tendered a plea agreement to the Defendant-Appellant on or around March 20, 2007 which the Defendant-Appellant rejected.

On June 1, 2007, Mr. Hutzler filed a motion to dismiss the indictment based upon double jeopardy. Attached to the motion were affidavits from Defendant-Appellant Hutzler and Mr. Hutzler's counsel, Harley O. Wagner. In the affidavits, both swore that they believed that the original charges of Burglary, Grand Larceny, and Destruction of Property had been dismissed with prejudice pursuant to the plea agreement.

On June 6, 2007, Mr. Hutzler filed an amended motion to dismiss the indictment based upon the State's destruction of possibly exculpatory blood evidence.

On June 4, 2007, at a pre-trial hearing, the State placed on the record that Trooper M.J. Glende had destroyed blood evidence taken from the car and the house because he believed that the entire case had been resolved. Pursuant to a court order, on July 9, 2007, the State flied a disclosure as to the blood evidence, stating that Trooper Glende had taken samples of substances believed to be blood from the bathtub of the victim's residence and the victim's automobile. Trooper Glende had disposed of the samples shortly following the April 4, 2006 plea hearing

before the Jefferson County Magistrate Court. The State also proffered that the victim had advised it that a blood stain remained on her bedroom wall.

On June 20, 2007, the State filed its response to the motion to dismiss based upon double jeopardy. The State countered that Jefferson County never had jurisdiction over the Burglary, Grand Larceny, and Destruction of Property charges and that the charges were dismissed because of lack of jurisdiction, rather than pursuant to the plea agreement. Attached to the filing was an affidavit from the Assistant Prosecuting Attorney of Jefferson County, Steve Groh. Mr. Groh swore that he had only learned that Jefferson County lacked jurisdiction on the day of the plea hearing, April 4, 2006 and that he had informed the Defendant-Appellant and his counsel that the charges were being dismissed because of lack of jurisdiction.

On July 2, 2007, the State filed its response to the motion to dismiss based upon the destruction of potentially exculpatory evidence. The Defendant-Appellant filed his reply on July 12, 2007.

On August 2, 2007, a hearing on the pre-trial motions was held before the Honorable Gray Silver, III, in the Circuit Court of Berkeley County, West Virginia. The Circuit Court denied the Defendant-Appellant's motion to dismiss based on double jeopardy. The Circuit Court found that the Burglary, Grand Larceny, and Destruction of Property charges all occurred solely in Berkeley County, and, thus, Jefferson County never had jurisdiction of these charges. Thus, because Jefferson County lacked jurisdiction, the court found that Mr. Hutzler had never originally been placed in jeopardy on these charges. Furthermore, the court fully adopted the Affidavit from the Jefferson County Assistant Prosecuting Attorney, and seemingly ignored the Defendant-Appellant's own affidavits.

The Circuit Court also found that the destruction of the blood evidence had violated the Defendant-Appellant's due process rights. The court concluded that the blood evidence was material to Defendant-Appellant's defense, the State had a duty to preserve the evidence, and that the State negligently breached its duty to preserve this evidence. However, the Circuit Court found that the importance of the missing evidence was minimal because a substantial amount of secondary evidence existed, and denied the Defendant-Appellant the remedy of dismissal of the indictment for the State's due process violation.

On or around August 28, 2007, Michael S. Hutzler entered into a conditional plea agreement with the State, whereby he pled guilty to Felony Destruction of Property. The plea agreement called for suspension of a jail sentence in lieu of 3 years probation. Pursuant to the plea agreement, Defendant-Appellant reserved his right to appeal the rulings on the dismissal of all counts based on double jeopardy and the dismissal of all counts based upon destruction of possibly exculpatory evidence.

ARGUMENT

I. STANDARD OF REVIEW

"Where the issue on an appeal from the circuit court is clearly a question of law..., we apply a *de novo* standard of review." Syl. Pt. 3, *State ex rel. Gessler v. Mazzone*, 572 S.E.2d 891 (W. Va. 2002). "[A] double jeopardy claim... [is] reviewed *de novo*." *State v. Ray*, __ S.E.2d __, 2007 WL 3317526 (W. Va. Nov. 8, 2007) (quotations and citation omitted). "[U]nderlying factual findings" are reviewed "under a clearly erroneous standard...," and "the final order and ultimate disposition" are reviewed "under an abuse of discretion standard." *State ex rel. Shelton v. Painter*, __ S.E.2d __, 2007 WL 4150437 (W. Va. Nov. 21, 2007).

II. DOUBLE JEOPARDY

Both the United States and the West Virginia Constitutions afford a person protection from double jeopardy. The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and "The Double Jeopardy Clause in Article III, § 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. [And i]t also prohibits multiple punishments for the same offense." Syl. Pt. 1 & 2, *State v. Gill*, 416 S.E.2d 253 (1992).

Relevantly, the State is barred from prosecuting a person on the same charges where jeopardy has attached to the original proceedings. "[O]ne is in jeopardy when he has been placed on trial on a valid indictment, *before a court of competent jurisdiction*, has been arraigned, has pleaded and a jury has been impaneled and sworn." *State v. Gibson*, 384 S.E.2d 358, 361 (W.

Va. 1989) (emphasis added). Thus, this is the lynchpin issue of this appeal. If jeopardy attached to the Burglary, Grand Larceny, and Destruction of Property charges in the Jefferson County proceedings, then the State is prohibited from indicting the Defendant-Appellant again because it is beyond reproach that the charges from Jefferson County are the same exact charges involving the same exact facts in Berkeley County.

Therefore, the first question is whether Jefferson County had legitimate jurisdiction and whether the State issued a valid indictment against Mr. Hutzler on the Burglary, Grand Larceny, and Destruction of Property charges.

A. Jurisdiction Is Not the Same as Venue

Defendant-Appellant Hutzler asserts that he was before the Circuit Court of Jefferson County on a valid indictment for Burglary, Grand Larceny and Destruction of Property and that the Circuit Court of Jefferson County had competent jurisdiction over these charges. *See Gibson*, 384 S.E.2d at 361. Therefore, jeopardy attached when he pled guilty to the Domestic Assault and Assault charges and the Burglary, Grand Larceny, and Destruction of Property charges were dismissed pursuant to his plea agreement.

The Circuit Court found that Mr. Hutzler had not been "in danger of conviction and punishment on the improper charges of burglary, grand larceny, and destruction of property" because Jefferson County lacked jurisdiction to charge him, and therefore he had "not been put twice in jeopardy of life or liberty for the same offense...." (Pre-Trial Hearing Order 5). However, the Circuit Court clearly erred by conflating venue with jurisdiction.

This Court has held that:

Venue designates the county or place in which a court having jurisdiction may properly

> hear and determine the case.... Jurisdiction implies or imports the power of the court, venue the place of action. Venue is procedural and statutes relating thereto are so treated. Venue is not a jurisdictional question in a strict sense of the word.

State ex rel. Chemical Tank Lines, Inc. v. Davis, 93 S.E.2d 28, 32 (W. Va. 1956) (citations omitted). This Court has further delineated venue and jurisdiction in relation to criminal cases:

> Although at times related, [venue and jurisdiction] are hardly synonymous. In the context of a criminal case, jurisdiction involves the inherent power of [a] court to decide a criminal case, whereas venue relates to the particular county or city in which a court with jurisdiction may hear and determine a case. Thus, any court authorized by the [state] Constitution, or a statute enacted pursuant thereto, to hear and determine a case involving a criminal act has jurisdiction thereof.

State v. Tommy Y., Jr., 637 S.E.2d 628, 634 (W. Va. 2006) (quoting *State v. Dennis*, 607 S.E.2d 437, 448 (2004)). *See also Willis v. O'Brien*, 153 S.E.2d 178, 180 (W. Va. 1967) ("Jurisdiction is a constitutional endowment of power to hear and determine a case. Thus, any court authorized by the Constitution, or a statute enacted pursuant thereto, to hear and determine a case involving a criminal act has jurisdiction thereof. Venue, on the other hand, is merely the place of trial. It designates the particular county in which a court having jurisdiction may properly hear and determine the case.").

In support of the difference of venue and jurisdiction "[i]n the context of criminal litigation, federal courts have [also] taken the position that '[v]enue is not jurisdictional[.]'" *Tommy Y., Jr.*, 637 S.E.2d at 634 (quoting *United States v. Calderon*, 243 F.3d 587, 590 (2d Cir. 2001). *Accord United States v. Walden*, 464 F.2d 1015, 1016n.1 (4th Cir. 1972) ("[I]mproper venue is not a jurisdiction defect[.]); *United States v. Evans*, 62 F.3d 1233, 1236 (9th Cir. 1995); *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir. 1981).

Therefore, because venue is not jurisdictional, "a defect in a charging instrument

involving venue is subject to waiver if not asserted prior to trial." *Tommy Y., Jr.*, 637 S.E.2d at 635. While "a defendant is... afforded a constitutional right to be tried in the county where the crime was committed and such right cannot be abrogated, either by the courts or by statute [and]... the venue lies only in the county where the crime was committed and at no other place," venue, unlike jurisdiction, is waivable and a "defendant [can] waive[] his right or file[] a motion for a change of venue." *Willis,* 153 S.E.2d at 180 (citing Article III, Section 14 of the Constitution of West Virginia). Therefore, once a defendant pleads guilty, the right to object to improper venue is waived and the guilty plea will be valid. *See State ex rel. Combs v. Boles*, 151 S.E.2d 115, 119 (W. Va. 1966) ("A plea of guilty accepted and entered by the court, is a conviction or the equivalent of a [jury] conviction."). *See also State v. Teel*, No. S-06-011, 2006 WL 2847415 (Ohio App. Oct. 6, 2006) ("[W]hile it is true that venue is a fact which must be proved in criminal prosecution unless it is waived by the defendant, a guilty plea constitutes such a waiver and precludes a defendant from challenging the factual issue of venue on appeal.").

Based on the difference between jurisdiction and venue, the Circuit Court's holding that Mr. Hutzler was not in danger of conviction and punishment on the Burglary, Grand Larceny, and Destruction of Property charges in Jefferson County is patently incorrect. Mr. Hutzler could have objected to the venue prior to trial, but having signed the plea agreement and having entered the guilty plea to the other charges, Mr. Hutzler waived any objection to venue. If Mr. Hutzler went to trial and was convicted of the Burglary, Grand Larceny, and Destruction of Property charges, the conviction would stand. The Circuit Court of Jefferson County had original jurisdiction over Mr. Hutzler's case. *See* Article VIII, Section 6, of the Constitution of West Virginia ("Circuit courts shall have original and general jurisdiction... of all crimes and

misdemeanors."). Even though Jefferson County is arguably an improper venue, any objection based on venue would have been waived by Mr. Hutzler's failure to object to venue prior to his guilty plea.

To now allow the State a second bite of the apple is fundamentally unfair. It allows the State to circumvent the original bargain that it entered with Mr. Hutzler by gaining the convictions from the plea agreement, and further being able to seek convictions on the dismissed charges. If Mr. Hutzler had pled guilty to one of the felony counts, the Court would correctly uphold the conviction in the face of a venue challenge based upon Mr. Hutzler's failure to object to venue. Further, if Mr. Hutzler had went to trial in Jefferson County and been found not guilty of the felony charges, the State could not overturn the jury's verdict based upon want of venue. Venue would have been waived once the trial began. Consequently, it would also be fundamentally unfair to allow the State to circumvent the burden of its bargain based upon a venue objection, as venue is waived once Mr. Hutzler pled guilty.

Once Mr. Hutzler entered his guilty plea, he waived any objection to improper venue, and, thus, the Circuit Court of Jefferson County had proper jurisdiction over him. Thus, Mr. Hutzler was in danger of conviction and punishment in Jefferson County and jeopardy attached to these proceedings. Therefore, as the State has the power to dismiss charges without prejudice for any reason, the only question that remains is whether the Burglary, Grand Larceny, and Destruction of Property charges were dismissed pursuant to the plea agreement or for some other reason. Mr. Hutzler suggests that the evidence in this case clearly supports a finding that the charges were dismissed pursuant to the plea agreement and not because of the mistaken belief that Jefferson County lacked jurisdiction.

B. The Circuit Court Failed to Make the Proper Findings of Fact as to the Reliability of Mr. Hutzler and the State's Competing Affidavits

Mr. Hutzler asserts that the Circuit Court abused its discretion in failing to make the proper finding of fact as to which of the competing affidavits was more credible. Without stating any reasons for its decision, the Circuit Court summarily accepted the State's affidavit from the Jefferson County Assistant Prosecuting Attorney and ignored the affidavits from Mr. Hutzler and Harley O. Wagner. Mr. Hutzler states that all of the objective evidence substantially supports the credibility of his and Mr. Wagner's affidavit to the detriment of the Jefferson County Assistant Prosecuting Attorney's affidavit.

In this case, where the Circuit Court based its decision on affidavits and not the live testimony of witnesses, the Supreme Court of Appeals of West Virginia may draw its own conclusions from the affidavits without heightened deference to the Circuit Court. "Ordinarily, this Court will defer to credibility determinations made by a trial court because '[a] reviewing court cannot assess witness credibility through a record." *Ware v. Howell*, 614 S.E.2d 464, 467 (W. Va. 2005) (quoting *Michael D.C. v. Wanda L.C.*, 497 S.E.2d 531, 538 (1997)). "However, this deference evaporates when a credibility determination is made from testimony presented in a deposition. This is because in reviewing evidence presented through deposition testimony, all impressions of... credibility are drawn from the contents of the evidence, and not from the appearance of witnesses and oral testimony at trial." *Ware*, 614 S.E.2d at 467-68 (quotations omitted). "That is, when evidence is presented by deposition, the reviewing court may draw its own conclusions about the... credibility of the... testimony since it is in the same position as the

trial judge for evaluating such evidence." *Id.* at 468 (quotations omitted). Thus, this Court should examine the affidavits *de novo*, as this Court is in as good a position as was the Circuit Court.

In the case *sub judice*, the Circuit Court had before it two conflicting versions of affidavits. Both Mr. Hutzler and his counsel, Harley O. Wagner, submitted affidavits stating that they understood the charges of Burglary, Grand Larceny, and Destruction of Property to be dismissed with prejudice pursuant to the plea agreement. (Hutzler and Wagner Affidavits). Stephen V. Groh, the Assistant Prosecuting Attorney of Jefferson County, submitted an affidavit swearing that he told the Defendant-Appellant and Mr. Wagner that the Burglary, Grand Larceny, and Destruction of Property charges were being dismissed for lack of jurisdiction. (Groh Affidavit).

Obviously, one of these affidavits contains a misrepresentation or a mistake. Looking to the objective evidence in this case suggests that Mr. Hutzler and Mr. Wagner's affidavits were substantially more credible. The State presented no corroborating evidence to support the credibility of Mr. Groh's affidavit. The State entirely relied upon Mr. Groh's sworn statement. Conversely, Mr. Hutzler offered substantial corroborating evidence to support his affidavit.

1. All of the Official Documentation Suggests that the Charges Were Dismissed Per the Plea Agreement

First, all of the written material regarding the felony counts in Jefferson County contained reference to the counts being dismissed per the plea agreement. The disposition sheets of the Burglary, Grand Larceny, and Destruction of Property counts contained the notation "dismissed per plea." While the Circuit Court held that such a notation was made by the Magistrate and did

not reflect the proper disposition of the case, the Circuit Court fails to take into consideration that even though the State did not make the notation, the State had ample opportunity to object to such a disposition. The State nor the Court explains why Mr. Groh. if he knew the "dismissed per plea" disposition to be false, never objected or attempted to change the disposition.

Furthermore, beyond the disposition sheets, Mr. Groh, himself, filed the motion to dismiss the remaining charges against Mr. Hutzler. Assuming that Mr. Groh was dismissing the charges for want of jurisdiction and not per the plea agreement, one would assume that a competent attorney would have included the reasons for dismissal in the motion, considering that dismissal for lack of jurisdiction would be without prejudice while dismissal per the plea agreement would be with prejudice. However, any reference to a lack of jurisdiction is conspicuously absent from the motion to dismiss. Instead, as with the disposition sheets, "per plea" is handwritten on the motion by the Magistrate Judge.

2. The Actions of the Chief Investigating Officer, Trooper M.J. Glende, Suggest That the Felony Charges Were Dismissed Per the Plea Agreement

Second, following the plea hearing on April 4, 2006, Trooper M.J. Glende destroyed the blood evidence that was directly related to the felony charges of Burglary, Grand Larceny, and Destruction of Property. The blood evidence was taken from the victim's house, which was located in Berkeley County. Obviously, Trooper Glende believed that the plea hearing had resolved the entire case, including the felony charges. Moreover, if the felony charges had truly been dismissed for lack of jurisdiction why did Assistant Prosecutor Groh not ensure that the relevant evidence be preserved for the possible trial in Berkeley County? One would assume that a competent prosecutor would ensure against the destruction of direct biological evidence that

may link a defendant to a crime, if the charges were intended to be dismissed without prejudice.

3. The Amount of Restitution Ordered By the Court Was Directly Related to the Dismissed Felony Charges, Suggesting that the Felony Charges Were Not Dismissed For Lack of Jurisdiction

Finally, the Probation Order, which was signed by all parties involved in this case, including Assistant Prosecutor Groh, mandated that Mr. Hutzler pay restitution in the amount of $5,000 to the victim. That restitution amount was derived directly from the felony charges of Burglary, Grand Larceny, and Destruction of Property. In its pleadings, the State suggests that the approximate monetary value of the allegedly stolen and destroyed items was $4,223.48. (State's Response to Amended Motion to Dismiss 1). Assuming that the felony charges were dismissed for lack of jurisdiction, why was Mr. Hutzler ordered to pay restitution for the damage resulting directly from those felony charges? The order of $5,000 restitution to be paid to the victim supports the conclusion that all of Mr. Hutzler's charges were disposed of pursuant to the plea agreement.

Essentially, the Circuit Court's ruling as to the credibility of Mr. Groh's affidavit means that everyone else involved in this case besides Mr. Groh was mistaken as to the disposition. To accept Mr. Groh's affidavit as credible, the Court must find that Defendant-Appellant Hutzler, defense counsel Harley O. Wagner, Magistrate Judge William E. Senseney, and the chief investigating officer, M.J. Glende were all mistaken as to the charges being dismissed pursuant to the plea agreement. Overwhelmingly, the actions and beliefs of the Court, the Defendant-Appellant, the Defendant-Appellant's counsel, and the police suggest that the Jefferson County charges were dismissed pursuant to the plea agreement. To hold otherwise, based on the singular affidavit of the Assistant Prosecuting Attorney, without any corroborative evidence, is not only

clearly erroneous but illogical and in four square opposition to jurisprudence concerning reliability of evidence.

C. Assuming *Arguendo* that Venue Is Jurisdictional And Cannot Be Waived, the Circuit Court of Jefferson County Had Proper Venue Over the Charges of Burglary, Grand Larceny, and Destruction of Property Pursuant to Section 61-11-12 of the West Virginia Code

Appellant Hutzler suggests that even if this Court finds that venue is jurisdictional, the charges of Burglary, Grand Larceny, and Destruction of Property could have been properly prosecuted in Jefferson County.

Under Section 61-11-12 of the West Virginia Code:

> When an offense is committed partly in one county and partly in one or more other counties within this State, it may be alleged that the offense was committed and the accused may be tried in any one county in which any substantial element of the offense occurred.

W. Va. Code, § 61-11-12. In interpreting this section, the Supreme Court of Appeals of West Virginia has held that "[t]he crime itself or some act or element entering into it must actually have taken place in the county where the venue is laid and the trial had. It is true that certain crimes may take place and be committed in more than one locality, in which case venue may be laid in all or any one of such places." *State v. Dignan*, 171 S.E. 527, 528 (W. Va. 1933). Essentially, the "statue regarding venue provides that where a crime is committed in more than one county, venue exists in any county in which a substantial element of the offense occurred." *State v. Clements*, 334 S.E.2d 600, 605 (W. Va. 1985) (citing W. Va. Code § 61-11-12).

Therefore, to determine if Jefferson County was a permissible venue for the prosecution of Burglary, Grand Larceny, and Destruction of Property, the Court should look to the elements of the charged offenses and determine if any of those elements occurred in Jefferson County.

1. A Substantial Element of Larceny, the Carrying Away of Personal Property, Occurred in Jefferson County

First, a substantial element of larceny occurred in Jefferson County. "To support a conviction for larceny at common law, it must be shown that the defendant took and carried away the personal property of another against his will and with the intent to permanently deprive him of the ownership thereof." Syl. Pt. 6, *State v. Jenkins*, 443 S.E.2d 244 (W. Va. 1994). The record is clear that the State was alleging that Mr. Hutzler carried away the personal property of the alleged victim into Jefferson County. Mr. Hutzler was arrested in Sheperdstown, West Virginia on West Virginia Route 45 in Jefferson County, and the arresting officer observed women's clothing and antique furniture in Mr. Hutzler's truck. The women's clothing and the antique furniture are the alleged pieces of personal property claimed to be carried away with the intent to permanently deprive the victim. Thus, because the personal property was allegedly carried away to Jefferson County, a substantial and critical element of larceny occurred in Jefferson County. As such, venue for the larceny charge was proper in Jefferson County, and this Court should find that because venue was proper, Mr. Hutzler was put in jeopardy when he was charged with larceny in the Jefferson County Circuit Court. Therefore, the Prosecuting Attorney's Office of Berkeley County should be precluded from retrying the larceny charge under double jeopardy principles.

2. A Substantial Element of the Charge of Destruction of Property Occurred in Jefferson County

A substantial element of Destruction of Property occurred in Jefferson County. Section 61-3-30(b) of the West Virginia Code defines the offense of destruction of property as follows:

> Any person who unlawfully, willfully and intentionally destroys, injures or defaces the real or personal property of one or more other persons or entities during the same act, series of acts or course of conduct causing a loss in the value of the property in an amount of two thousand five hundred dollars or more, is guilty of the felony offense of destruction of property.

W. Va. Code, § 61-3-30(b). Furthermore, Section 61-3-30(a) provides for a lesser included offense to felonious destruction of property, where the value of the destroyed property is less than $2,500:

> If any person unlawfully, but not feloniously, takes and carries away, or destroys, injures or defaces any property, real or personal, of another, he or she is guilty of a misdemeanor....

W. Va. Code, § 61-3-30(a).

Under the offense of destruction of property, a substantial element is the value of the destroyed property. In this case, it is clear that the State calculated the value of the antique furniture found in Mr. Hutzler's truck in determining the amount of the destroyed property. (Amended Motion to Dismiss Indictment, Attachment - Property Sheet). As stated above, this antique property was discovered in Mr. Hutzler's truck while he was parked in Jefferson County. Therefore, because some of the property allegedly destroyed and calculated in the total amount of loss was located in Jefferson County, a substantial element of the offense occurred in Jefferson County.

Furthermore, it is beyond reproach that while Mr. Hutzler was charged with felonious destruction of property, he was also in jeopardy of being found guilty of the lesser included offense of misdemeanor destruction of property if a trier of fact found that the total amount of damage did not exceed $2,500. A substantial element of the lesser included offense of misdemeanor destruction of property is the carrying away of any personal property. Again,

because Mr. Hutzler allegedly carried away the property to Jefferson County, a substantial element of the alleged offense occurred in Jefferson County, making venue in Jefferson County permissible. Therefore, because Jefferson County could have permissibly prosecuted Mr. Hutzler for destruction of property, Mr. Hutzler was placed in jeopardy in Jefferson County, making it impermissible and a violation of the Double Jeopardy Clause for Berkeley County to subsequently charge him with the exact same count of destruction of property.

3. A Substantial Element of the Charge of Burglary Occurred in Jefferson County

Finally, because both charges of larceny and destruction of property partially involved conduct occurring in Jefferson County, burglary also necessarily contains a substantial element that occurred in Jefferson County.

Section 61-3-11(b) of the West Virginia Code defines burglary as:

> a felony... [i]f any person shall,... in the daytime, break and enter, the dwelling house..., of another, *with intent to commit a crime therein*, he shall be deemed guilty of burglary.

W. Va. Code, § 61-3-11(b) (emphasis added).

Even though the breaking and entering occurred solely in the alleged victim's dwelling house in Berkeley County, the State is also required to prove that Mr. Hutzler had the intent to commit another crime therein. Obviously, the State would argue that Mr. Hutzler intended to commit larceny by breaking and entering into the alleged victim's home. Therefore, because larceny contains an element of carrying away, and Mr. Hutzler allegedly carried away the property to Jefferson County, the charge of burglary also necessarily includes the carrying away of the property.

Thus, because all three charges contain substantial elements that allegedly occurred in

Jefferson County, the Circuit Court of Jefferson County had permissible venue over the charges, and Mr. Hutzler was placed in double jeopardy when he was charged with the same offenses in Berkeley County.

III. DESTRUCTION OF EVIDENCE

Appellant Hutzler states that the Circuit Court abused its discretion in failing to grant his requested relief, although finding that his due process rights had been violated when the State destroyed possibly exculpatory blood evidence.

The properly applied standard under *State v. Osakalumi* is as follows:

> When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure...; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at trial to sustain the conviction.

Syl. Pt. 2, *State v. Osakalumi*, 461 S.E.2d 504, 505 (W. Va. 1995).

In the case *subjudice*, the Circuit Court properly concluded that the State's destruction of the blood evidence amounted to a violation of Appellant Hutzler's due process rights. First, the Circuit Court found that "the blood evidence in question would have been evidence material to the preparation of Defendant's defense under West Virginia Rule of Criminal Procedure 16(a)(1)[C]." (Aug. 31, 2007 Order 7). Second, the Circuit Court concluded "that the State did have a duty to preserve the blood evidence... [because] the Jefferson County Assistant Prosecutor was aware that it was possible that charges could be brought against the Defendant in another

jurisdiction." (Aug. 31, 2007 Order 7-8). Finally, the Court "determine[d] that the State had a duty to preserve the evidence [and] that the State breached its duty to preserve the blood evidence." (Aug. 31, 2007 Order 8).

In addressing the consequences of the State's breach of its duty to preserve possibly exculpatory evidence, the Circuit Court found that "the State was negligent in allowing the blood evidence to be destroyed when the State was aware it was possible the Defendant could be charged in Berkeley County for Burglary, Grand Larceny, and Destruction of the Property." (Aug. 31, 2007 Order 9). Furthermore, the Circuit Court found that there was no reliable or probative substitute evidence for the negligently-destroyed blood evidence. The Circuit Court found that even though there was supposedly dried blood on the victim's bedroom wall, "considering the nearly two years that has elapsed since the crime took place and the lack of any preservation or chain-of-custody procedure involving this particular blood spot," this dried blood was not a sufficient substitute. (Aug. 31, 2007 Order 9-10).

However, the Circuit Court found that there was other evidence that could link the Appellant to the crime, including two witnesses who could place the Appellant at the crime scene and the police report indicating that the Appellant was found to be in possession of property taken during the alleged burglary. (Aug. 31, 2007 Order 10). Thus, the Circuit Court concluded that the remedy of dismissal of the indictment would not be granted for the State's violation of Mr. Hutzler's due process rights due to the destruction of possibly exculpatory evidence.

Appellant Hutzler states that the Circuit Court abused its discretion in failing to grant the proper remedy of dismissal of the indictment for the State's due process violation. Appellant Hutzler suggests that it is inconceivable that the State could violate his due process rights, yet

that no remedy would be available for the violation. Essentially, the Circuit Court's decision denies him of any remedy for the violation of his due process rights.

This case is different from the typical case where a jury determines that a defendant is guilty, and then a court must determine whether the proper remedy for a due process violation would be a reversal of the jury's verdict or a new trial. In such cases, where other evidence was substantial, the proper remedy would be ordering a new trial. Where the other evidence was not sufficient, the defendant could obtain the radical relief of a reversal and acquittal.

The Circuit Court seems to be operating under the assumption that as long as the other evidence, without the destroyed evidence, amounted to probable cause for an indictment, the case could proceed to trial. The Circuit Court writes that "there exists enough other evidence to support this matter proceeding to trial on the indictment as charged." However, such a finding misinterprets *Osakalumi* jurisprudence. The issue is not whether enough alternative evidence exists to allow the matter to proceed to trial, but whether it would be fair to proceed to trial where the destruction of the evidence denied the defendant a possible complete defense to all the charges against him. The blood evidence was crucial and direct. Essentially, a test on the blood would conclusively determine that the defendant was either innocent or guilty of the charged crimes. The destruction of the evidence eliminated the best evidence for the defense that the Appellant was not guilty. Despite there being other evidence, the Court should focus on the deprivation of the Appellant's ability to present a defense. To proceed to trial, despite the Appellant being denied his best defense by the State's negligent destruction of possibly exculpatory evidence, would fundamentally deny the Appellant his basic due process rights. Thus, even though other evidence existed, the Circuit Court should have dismissed the

indictment based on the State's negligent destruction of evidence preventing the Appellant from presenting an adequate defense to the charges against him.

Thus, even though the Circuit Court properly applied the standard in *Osakalumi*, the posture of the destruction of the evidence is much different, and the Circuit Court failed to recognize the difference. In *Osakalumi*, the issue was whether a murder had taken place or whether the victim had committed suicide. 461 S.E.2d at 508. The State put on expert testimony that the trajectory of the bullet was consistent with murder and made suicide impossible. *Id.* However, before the defendant had an opportunity to examine the bullet hole in the couch, the State destroyed the couch. *Id.* Thus, the defendant was denied an opportunity to rebut the testimony of the expert witness that the shooting could not be a suicide. *Id.* Because there was significant evidence in the form of eyewitnesses and a confession, the Court found that the proper remedy would be to grant the defendant a new trial without the introduction of the testimony of the expert witness regarding the trajectory of the bullet. *Id.* at 514. In this respect, the defendant would still be afforded the opportunity to present the defense that the victim's death was a suicide and not a murder. In fact, the defendant was placed in a better position regarding this defense because he would no longer be required to rebut the evidence of the State that the trajectory of the bullet was consistent with a murder.

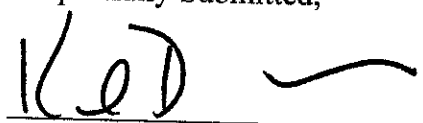
In this case, the same remedy would not be appropriate. The Appellant is not suggesting that his rights have been violated by not being able to test the blood evidence to rebut the testimony of the State's expert, but rather that the blood evidence itself, which was never tested by the State or the Appellant, would possibly offer a complete defense to the charges. There can be no remedy through allowing the Appellant to proceed to trial and precluding the State from

introducing testimony regarding the blood evidence. This is not the case where the Appellant wanted to introduce the blood evidence to rebut the evidence offered by the State, but rather the Appellant would have proffered the blood evidence as an affirmative defense. The negligent destruction of the blood evidence conclusively denied the Appellant a possible complete defense to all the charges, and thus even allowing the case to proceed to trial would be fundamentally unfair. Therefore, the decision of the Circuit Court should be reversed and the indictment against Mr. Hutzler should be dismissed based on the destruction of exculpatory evidence by the State.

CONCLUSION

Appellant Hutzler respectfully requests this Honorable Court to reverse the decision of the Circuit Court and dismiss the indictment because the retrial of the charges in Berkeley County constituted double jeopardy or alternatively because the State denied Mr. Hutzler his due process rights by negligently destroying exculpatory blood evidence prior to testing. Appellant Hutzler also requests that this Court grant him oral argument to further develop these positions.

Respectfully Submitted,

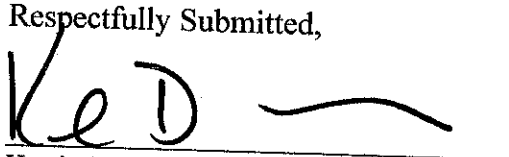


Kevin D. Mills
State Bar No. 2572
Mills & Wagner, PLLC
1800 West King Street
Martinsburg, West Virginia 25401
(304) 262-9300
Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I, Kevin D. Mills, hereby certify that an original plus nine (9) copies of this brief was served, via Federal Express, upon the Rory L. Perry, II, Clerk, West Virginia Supreme Court of Appeals at East 317 State Capitol, Charleston, WV 25305 and a copy upon Christopher Quasebarth, Assistant Prosecuting Attorney at his address of 380 W. South Street, Suite 1100 Martinsburg, WV 25401 by U.S. Mail, postage prepaid this 21st day of August, 2008.

Respectfully Submitted,



Kevin D. Mills
State Bar No. 2572
Mills & Wagner, PLLC
1800 West King Street
Martinsburg, West Virginia 25401
(304) 262-9300
Counsel for Defendant-Appellant