

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 34158

MICHAEL S. HUTZLER,

Defendant-Appellant,

v.

STATE OF WEST VIRGINIA,

Plaintiff-Appellee.

APPELLANT'S REPLY BRIEF

Appeal from Circuit Court of Berkeley County, West Virginia

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

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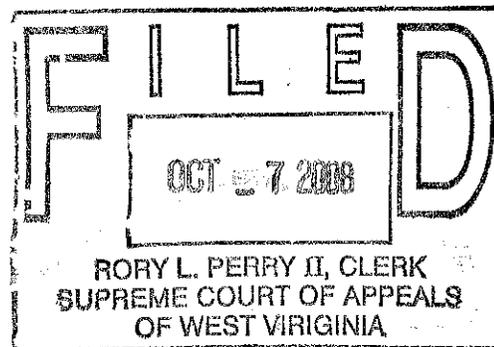


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ARGUMENT

I. DOUBLE JEOPARDY

As stated in Appellant's opening brief, 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).

In its brief, the State continues to erroneously insist that venue is somehow jurisdictional, despite the abundance of case law to the contrary. See Appellee's Brief at 12 n.2. "In the context of criminal litigation, federal courts have [also] taken the position that '[v]enue is not jurisdictional[.]'" *State v. Tommy Y., Jr.*, 637 S.E.2d 628, 634 (W. Va. 2006) (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); *Willett v. United States*, 655 F.2d 1007, 1011 (10th Cir. 1981). 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 v. O'Brien*, 153 S.E.2d 178, 180 (W. Va. 1967) (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.”).

Thus, contrary to the State’s argument, a defendant implicitly waives his right to object to venue by pleading guilty. When the Appellant pled guilty to the misdemeanor charges in exchange for dismissal of the felony charges, Appellant implicitly waived any objections to venue. Certainly, Appellant could not impliedly waive any jurisdictional defect, but courts have held that venue is not jurisdictional and can be waived by inaction. The State is correct in asserting that change of venue requires affirmative action. However, change of venue is not the issue in dispute. Rather, waiver of venue is the issue, which requires no affirmative action except the acceptance of a guilty plea.

Moreover, assuming *arguendo* that venue was somehow not waivable, even absent a waiver, venue for the felony charges could have been appropriate in Jefferson County, rather than Berkeley County. In its response, the State never addresses this argument proffered by the Appellant, besides reflexively reciting that the house at issue was located in Berkeley 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).

Here, the Appellant submitted that substantial elements of larceny, burglary, and destruction of property occurred in Jefferson County. A substantial element of larceny is that “the defendant took and carried away the personal property of another....” 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. The State admits this inasmuch as it states that Mr. Hutzler was arrested in Shepherdstown, 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. Appellee’s Brief at 2. Furthermore, the carrying away of the property is a substantial element in both the felony destruction of property charge, inasmuch as said property was valued under \$2,500, and in the burglary charge, inasmuch as the alleged felony intended by breaking into the house was larceny. Therefore, even assuming the Appellant could not implicitly waive venue, which he clearly could according to well-established case law, because substantial elements of the felonies occurred in Jefferson County, venue would have been proper.

Therefore, the only issue is whether the felony charges were dismissed pursuant to the

plea agreement or were transferred over to Berkeley County. Appellant suggests that as to this issue, the bulk of evidence is in his favor that the charges were dismissed pursuant to the plea agreement.

The only evidence supplied by the State in support of the charges being dismissed for lack of venue was the affidavit of Jefferson County Assistant Prosecuting Attorney Groh. The State labels the affidavit as 'unrefuted' despite the fact that Appellant has presented much evidence to refute this affidavit.

A simple chart will reveal the inaccuracy of State's designation of the affidavit as unrefuted. The left side represents the evidence offered by Appellant, and the right side represents the evidence offered by the State.

Appellant's Evidence that Felony Charges Were Dismissed Pursuant to the Plea Agreement	State's Evidence that Felony Charges Were Dismissed for Lack of Venue
Affidavit of Appellant Michael Hutzler	Affidavit of Groh
Affidavit of Appellant's Attorney, Harley Wagner	
Disposition Sheet of Felony Charges Containing Notation "Dismissed Per Plea"	
Mr. Groh's Motion to Dismiss Charges Did Not State that the Charges Were Being Dismissed for Lack of Venue	
The Magistrate Handwritten Notation of "Per Plea" on Motion to Dismiss Charges	
The Chief Investigation Officer Destroyed Evidence of the Felony Charges, Believing the Charges Had Been Finally Adjudicated	

The Probation Order, Signed by Mr. Groh, Mandated that the Appellant Pay Restitution in the Amount of \$5,000, the Approximate Amount of Loss of the Destroyed and Stolen Items	
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To find that Prosecutor Groh's affidavit established that the felony charges were dismissed because the State lacked venue in Jefferson County, in the face of the mountain of corroborated evidence that the charges were dismissed pursuant to the plea agreement, was a clear abuse of discretion on the part of the Circuit Court. Thus, this Court must reverse the Berkeley conviction and sentence as a violation of Mr. Hutzler's right to be free from double jeopardy.

II. DESTRUCTION OF EVIDENCE

The State does not dispute that it had a duty to preserve the blood evidence and negligently breached its duty to preserve the evidence, violating Appellant's due process rights. Instead, the State argues that there was enough other evidence to support the conviction, and therefore, the Appellant was not prejudiced by the destruction.

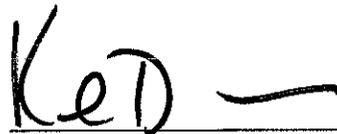
Here Appellant is not suggesting that his rights have been violated by not being able to test the blood evidence to rebut the testimony of the State's expert, but rather that the blood evidence itself, which was never tested by the State or the Appellant, would possibly offer a complete defense to the 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

WHEREFORE Appellant respectfully requests that this Honorable Court reverse the finding of the Circuit Court and dismiss the felony charges because the charges violate Appellant's right to be free from double jeopardy and because the State violated Appellant's due process rights by negligently destroying evidence. Appellant Hutzler also requests that this Court grant him oral argument to further develop these positions.

Respectfully Submitted,

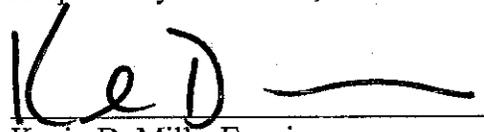
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CERTIFICATE OF SERVICE

I, Kevin D. Mills, hereby certify that an original plus nine (9) copies of this Reply Brief was served, via Federal Express, upon Rory L. Perry, II, Clerk, West Virginia Supreme Court of Appeals at 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, mailed by U.S. Mail, postage prepaid this 6th day of October, 2008.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Ked', followed by a horizontal line.

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