

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

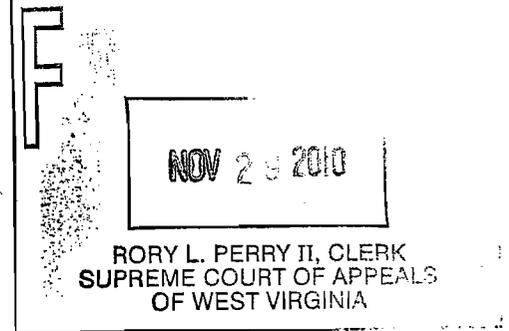
STATE OF WEST VIRGINIA,

APPELLEE,

VS.

JOSH LEE HEDRICK,

APPELLANT.



CASE NO. ~~33597~~

35536

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
APPELLEE,

VS.

CASE NO. 33597

JOSH LEE HEDRICK
APPELLANT.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

KIND OF PROCEEDING AND NATURE
OF THE RULING BELOW

The Appellant, Josh Lee Hedrick, (hereinafter referred to as Appellant) was convicted following a trial by jury in the Magistrate Court of Grant County, West Virginia, on the misdemeanor offense of interference with fishermen in violation of the provisions of *West Virginia Code*, §20-2-2a. The Appellant subsequently filed a Petition for Appeal of said conviction to the Circuit Court of Grant County. The Circuit Court heard the arguments of counsel for the parties and listened to the recordings of the trial. Based upon all of which, the Circuit Court made findings and rulings upholding and affirming the conviction. The Appellant filed a Petition for Appeal to this Court alleging several grounds for relief.

STATEMENT OF FACTS

The Appellee would contest the Appellant's recitation of the facts as set forth in the Introduction and Statement of Facts portion of his Brief. The whole argument made by

Appellant is based upon his contention that all this took place on his property and in his stream over which he had total control to the exclusion of others. However, it is absolutely clear from the evidence presented that his argument is baseless and that he was, in fact, performing illegal acts at the time. According to the evidence presented during the entire trial, the Petitioner's parents acquired twenty some acres in June, 1992. (State's Ex. No. 9). The vast majority of this land lays on the south side of the present West Virginia Routes 55/28 near Cabins, West Virginia. A very small portion is located on the north side of said State Road. There is a free flowing spring, which flows year round, coming out of the mountain and creating a stream which meanders in a southerly direction over and through the properties of several individuals, including the Appellant's parents, and into the North Fork of the South Branch of the Potomac River. (Rose Phares, Tr. Vol. 1, pp. 30-33; p. 37). (Appellant, Tr. Vol. 2, p. 32, pp. 41-42).

This property, including the spring, was originally part of the Grant County Poor Farm consisting of several hundred acres. On September 26, 1934, the Grant County Court conveyed to the State of West Virginia and the State Road Commission a parcel containing approximately 10.6 acres for the purposes of constructing a public road, as a part of its road system through the entire length of the Poor Farm property. This was not just an easement. This was a general warranty conveyance of said property. This property measures at various widths from a minimum of seventy feet to portions over one hundred feet. This property lies between the existing Route 55/28 and the spring. The portion of said former public road was replaced by the existing roadway but ownership of this property was retained by the Division of Highways. (Tr. Vol. 2, pp. 41-42).

In 1944, the Grant County Court sold off the major portion of the Poor Farm in lots and

bigger tracts. The land later acquired by Appellant's parents was one of those tracts. All of the various deeds from the County Court contained an exception and reservation for the benefit of all those who acquired ownership in the lots and tracts that were a part of the Grant County Poor Farm. This exception and reservation was the right to have water from the spring in question with the extended rights to lay pipe to said spring for that purpose. (Tr. Vol. 2, p. 54). When the Appellant's parents acquired their land, this exception and reservation was contained in their deed also. (State's Ex. No. 9)

On the major portion of the Appellant's parents' property located on the south side of Route 55/28, they developed a large number of cabins which are rented out for recreational purposes and a lodge. There is a pond located on this larger portion which had originally been built by a former landowner and which had been stocked with fish. The Appellant and/or his parents cleaned this pond and continue to stock it with fish. (Tr. Vol. 2, pp. 37-38). This pond is located a little distance east of the stream. In March, 2007, the Appellant applied to Department of Natural Resources (DNR) for a Commercial Fishing Preserve License. This type of license would allow the Appellant and his family to authorize their guests to fish on their property without having a valid fishing license and would also allow the Appellant/Family to charge the guests for the fish they caught. The evidence at trial reflected a dispute as to the areas covered by this license. The Appellant testified that it pertained to the pond and the stream but DNR contended it only applied to the pond and that the Appellant was notified of that fact verbally prior to October 4, 2008, and in writing after that date. (Def.'s Ex. No. 2 and State's Ex. Nos. 13 & 14) also (Tr. Vol. 1, pp. 106-109; pp. 125-129) and (Tr. Vol. 2, pp. 17-19, 67-69, 74-75, and 78-83).

In order to create a source of water for the pond, the Appellant in early 2008, applied to DNR for permits to do some work in the stream right near the spring. (State's Ex. Nos. 11 and 12). After some meetings, both DNR and the United States Army Corps of Engineers (Corps) authorized the work under specific conditions. Subsequently, some of the conditions were modified. In addition, and shortly before the above, the Appellant also applied for and was granted several permits from the Division of Highways (DOH) to install two water lines from the stream just below the spring to the edge of Route 55/28 and then to bore under Route 55/28 to a line then going to the pond. (Tr. Vol. 1, pp. 105-106) and (Tr. Vol. 2, pp. 58-59). These water lines would be running under the old State road for a distance of some two hundred feet from the stream to the edge of Route 55/28. Same would be under the land owned by DOH as originally acquired in 1934 from the Grant County Court.

This now brings us to the day of the crime. In the Brief, the Appellant emotionally describes that days events from his perspective. According to the State's witnesses, Kenneth and Rose Phares own a two acre tract situate on the north side of Route 55/28. (Def.'s Ex. No. 1). This tract would also adjoin the small portion of land owned by the Appellant's parents and located adjacent to the spring and stream situate on the north side of Route 55/28. The Phares property extends into the stream. The old road, DOH property, would also traverse through a portion of the Phares' two acres. Rose Phares gave Josh Reid permission to fish in the stream from their property on October 4. (Tr. Vol 1, p. 34). Mr. Reid had a valid fishing license with appropriate trout stamp. (Tr. Vol. 1, p 81 and 83).

Mr. Reid was fishing for some time before the arrival of the Petitioner. During a portion of this time, Mr. Reid's mother, Kim Mallow, and Mrs Phares were unloading some firewood

nearby on the Phares property. Mrs. Phares and Mrs. Mallow did, in fact, see two fish on Josh Reid's stringer before they left the area. (Tr. Vol. 1, pp. 35 and 71). Mrs. Mallow and Mrs. Phares left the area to go to work approximately one mile away. Mr. Reid testified that he was fishing and that he had caught four fish and had them on a stringer in the stream. When the Appellant arrived, the Appellant came across the stream making accusations. Mr. Reid picked up his stringer and retreated further up the bank and away from the stream further on to Phares property. The Appellant followed him and he dropped the stringer and the Appellant picked it up and went back toward the stream. (Tr. Vol. 1, p. 52). The Appellant's Brief describes the Appellant's actions as being only concerned with what he believed to be his fish and that he was not threatening or aggressive toward Mr. Reid. However, in his testimony he stated that he was furious at the time that he went across to where Mr. Reid was. That Mr. Reid grabbed his stringer and went up the bank. He followed him and upon approaching him, Mr. Reid dropped the stringer and put his hands up either in a defensive or protective manner. (Tr. Vol. 2, p. 25). He also stated that when going across the stream at Mr. Reid he could have said something like "Do you know you're not allowed to fish here?" However, he wasn't sure because a lot of cussing was going on at the time. (Tr. Vol. 2, p. 64). The Appellant testified that he didn't see Mr. Reid fishing when he got to the stream. (Tr. Vol. 2, p. 23). Yet his cousin, who was fifty or sixty yards behind him and further from the stream, clearly saw a man fishing from his vantage point. (Tr. Vol. 1, p. 154).

The Appellant admitted that he removed the fish and threw the stringer which ended up lodged in a tree. (Tr. Vol. 2, p. 36). Mr. Reid stated that he called his mother upon the Appellant taking the fish he had caught. (Tr. Vol. 1, p. 56). She arrived shortly thereafter. Appellant stated

that Mr. Reid did not come across stream until after his mother arrived. (Tr. Vol. 2, p. 65). Both Mrs. Phares and Mrs. Mallow testified that rocks were also thrown by the Appellant. (Tr. Vol. 1, pp. 36 and 72-73). Mr. Reid does make admissions that rocks were thrown by both he and the Appellant and that he went across the stream and threw a rock or rocks into the tub where the Appellant had placed Mr. Reid's fish. He also admitted at some point spitting at the Petitioner. But all of these actions occurred after the Appellant had taken Mr. Reid's fish and interfered with his fishing.

The Appellant did not have control over the spring or the stream at the point where Mr. Reid was fishing. The Appellant was fully aware in advance of that day since this was an ongoing issue at the spring/stream. Appellant even acknowledged that during the trial. During examination about prior complaints lodged by others as to his father's or his prior actions he stated "I've had problems with the neighbors is because they've allowed somebody to come in there fishing, knowing I was going to get mad and doing it just for spite." (Tr. Vol. 2, p. 55). Rose Phares testified that the Appellant and/or his father had put "No fishing" signs up at different times and had to remove them because DNR made them take them down before. (Tr. Vol. 1, pp. 47-48). In fact, the sign that was there on the one side on the day of the crime was taken down by DOH when it came in and set its stakes for its property. DOH has had a "No Dumping" sign up on its property for some time. (State's Ex. Nos. 1 and 8) and (Tr. Vol. 1, pp. 100-101).

The Appellant had full knowledge, long prior to the day of the crime, that he did not have the legal right to restrict fishing or use of the stream and the spring. Further, the evidence is clear that he did not have a legal right to propagate fish in that stream or otherwise. His portrayal of

himself as the flabbergasted, shocked, innocent victim of these events did not convince the jury that he was such.

POINTS AND AUTHORITIES RELIED UPON

WEST VIRGINIA STATUTORY AUTHORITY

West Virginia Code, §20-2-2a 1

WEST VIRGINIA CASE AUTHORITY

Addair v. Bryant, 168 W.Va. 306, 284 S.E.2d 374 (1981) 8

State v. Allen, 208 W.Va. 144, 539 S.E.2d 87 (1999) 8, 9

Canterbury v. Laird, 221 W.Va. 453, 655 S.E.2d 199 (2007). 9

State v. George W. H., 190 W.Va. 558, 439 S.E.2d 423 (1993) 8

State v. Green, 187 W.Va. 43, 415 S.E.2d 449 (1992) 8

State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995) 10

State v. Potter, 197 W.Va. 734, 478 S.E.2d 742 (1996) 8

OTHER SOURCES

Rule 3, *Rules of Appellate Procedure* 9

DISCUSSION OF THE LAW

1. WAIVER OF ALLEGED ERRORS

In his Petition for Appeal to this Court, the Appellant assigned six grounds as the basis for said Appeal. Assignments I through III were fairly specific. Assignments IV through VI are more general. In fact, Assignments IV and V simply refer to all of the other assignments without

making any further specification of the reasons. Assignment VI simply makes a recitation of the evidence from the trial, mainly from the Appellant's perspective, as to why the Circuit Court's decision in upholding the verdict is manifestly wrong and an injustice has been done. This type of general assignment is difficult to address since the whole basis for the Appellant's arguments before the Magistrate Court, the Circuit Court and in the Petition relies on the allegation that the State failed to prove that Mr. Reid was a lawful fisherman.

In the Case of *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981), the Court in Syllabus No. 6 stated that, "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." This principle has been upheld in criminal cases also as a rule of appellate practice. See: *State v. Potter*, 197 W.Va. 734, (Ft. Nt. 13 at page 741), 478 S.E.2d 742 (1996); *State v. George W. H.*, 190 W.Va. 558, (Ft. Nt. 6 at page 563), 439 S.E.2d 423 (1993); and *State v. Green*, 187 W.Va. 43, 415 S.E.2d 449 (1992) Syllabus No. 9.

Therefore, the Appellee will not address those Assignments which have not been specifically argued in the Appellant's Brief

The Appellant's Brief now presents a new argument that was never raised before the Magistrate Court, the Circuit Court nor in the Petition to this Court. The Appellant appears to now argue that even if the State did prove that Mr. Reid was a lawful fisherman, the State still failed to meet its burden since it did not prove that the Appellant "believed" that Mr. Reid was a lawful fisherman at the time of his actions. As stated above, this issue was raised for the first time in the Appellant's Brief and it appears to be to the exclusion of all of the prior assignments and arguments.

In Syllabus Point 1 of *State v. Allen*, 208 W.va. 144, 539 S.E.2d 87 (1999) this Court

stated that: "As a general rule, . . . errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there." Citing Rule 3(c) , *Rules of Appellate Procedure*, the Court in *Canterbury v. Laird*, 221 W.Va. 453, 655 S.E.2d 199 (2007), expanded said practice to an instance where the party did not raise the issue in its petition but argued same for the first time in his brief. The Court refused to consider the issue on appeal. In the *Allen* case, the Court does refer to some exceptions to the general rule. However, the Appellee would submit that there are distinctions between these two Cases in that the former pertains to failure to preserve the issue before the lower court and then raising same in the appellate court. Whereas, the Court appears to be more strict where not only does a party fail to raise an issue in the lower court but also fails to raise same in its petition to this Court and then waits until the brief to raise the issue.

All prior arguments of the Appellant regarding the sufficiency of evidence pertained to the alleged failure of the State to prove that Mr. Reid was a lawful fisherman. As stated above, the Appellant has now added to the mix the argument that in essence, so what if he is, if the State did not prove that the Appellant believed he was then the conviction cannot stand. This complete change in argument is something that should have been raised before the lower Courts and in the Petition in order for this Court to give it consideration. The Appellee would submit that the decision in *Canterbury* is specific that alleged errors raised for the first time in a party's brief will not be considered. Therefore, the Appellee would object to the consideration of same by the Court.

2. STANDARD OF REVIEW

No matter how flowery or emotional the argument presented by the Appellant, the issue

still comes down to a sufficiency of the evidence argument. The Court in *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), very clearly established the standard that an appellate court must follow in reviewing a sufficiency of the evidence argument. The Court stated in Syllabus No. 1 as follows:

“The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.”

3. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH GUILT.

The *Guthrie* Court went on to state that the above standard is a strict one and the appellate court will continue a “*highly deferential approach*” to the jury’s determination. The Court further opined “It is possible that we, as an appellate court, may have reached a different result if we had sat as jurors. However, . . ., it does not matter how we might have interpreted or weighed the evidence.

The Appellee would submit that the issue in this Case is purely a factual one upon which the jury had to decide the matter. The record would establish that an impartial jury was selected to here the evidence and render a decision in this matter. From the voir dire process some of those jurors had indicated that they were fishermen and/or women. (Tr. Vol. 1, p. 12). The parties had the opportunity to present their respective cases to the jury with little interference

from the other. The jury was properly instructed as to the State's burden of proof, the elements of the crime, and their duties. (Tr. Vol. 2, pp. 84-88). Certainly, the evidence of the witnesses was contradictory in many areas. The facts as presented and as cited previously would establish that the Appellant's argument was that he essentially had supremacy over the stream where the crime occurred and that he was free to do as he pleased and to prevent others from access to and enjoyment of the stream and fishing in the stream. However, the facts presented would show that this was not the case and that the area in question was actually owned by the State of West Virginia/Division of Highways. Further, the Appellant clearly submitted to the authority of both Federal (Corp of Engineers) and State (DNR and DOH) authorities in conducting some of his activities in the stream.

He spent a great deal of time in his testimony describing his fish spawning activities for which he did not have proper license. The evidence also revealed discrepancies in the contents of his applications for Commercial Fishing Licenses. He and his father had posted "No Fishing" signs on the one side of the stream in the past which they had to remove. They had again posted such a sign some time prior to the date of this crime. But it to was subsequently removed by DOH. The Appellant testified to his ongoing disputes with his neighbors over the stream and that they permitted others to fish there just to make him mad and for spite in his words even though he knew from prior actions that he did not have sole supremacy over the stream at that location.

On October 4, 2008, he saw Mr. Reid on the other side of the stream. He testified that he did not see him fishing even though his cousin, who was with him and some distance behind him, clearly saw Mr. Reid fishing. The Appellant admitted that he was furious when he went

across the stream toward Mr. Reid. He described a lot of cussing and that he may have said to Mr. Reid that he didn't have the right to fish there. His actions were of such a nature that Mr. Reid retreated from him and actually put up his hands thinking the Appellant was going to hit him. Yes, Mr. Reid admitted that after the Appellant took his fish he did do some things that were not appropriate. But, the actions of the Appellant were not appropriate and certainly could be interpreted to be threatening or inciting to Mr. Reid.

There was no evidence that Mr. Reid had done anything wrong during his time fishing. The Appellant makes a big deal about Mr. Reid's description of the amount of time it took him to catch the fish on his stringer. The jury, some of whom fished, certainly had the opportunity to judge that evidence. In fact, the jury had the opportunity to judge whether the good Christian that the Appellant referred to himself as was the person at the stream on October 4 or whether it was the furious individual who thought he could do whatever he wanted, whenever he wanted. Obviously, the jury saw through the facade. That was their responsibility to weigh the credibility and to weigh the evidence to determine if his motives were as pure as he let on or not.

The jury, who were not irrational people, performed their duty and found the Appellant guilty. The Magistrate, who is a hunter and a fisherman, and who heard all of the evidence and observed the witnesses concluded that there was sufficient evidence upon which a rational person could find the Appellant guilty beyond a reasonable doubt. On appeal to the Circuit Court, the Court heard the arguments by counsel and then listened to the tapes of the evidence. The Court made specific findings that the evidence, taken in the light most favorable to the State, was sufficient for a rational trier of fact to conclude that the Appellant was guilty. The comment made or dicta by the Court in a separate sentencing Order does not change the very specific

findings made in the orders denying the appeal.

CONCLUSION

The Appellee would submit that in applying the strict and highly deferential standard required by this Court in reviewing sufficiency of evidence claims, the evidence was more than sufficient for any rational trier of fact to find that all of the essential elements of the crime were established beyond a reasonable doubt. As a result, the Appellee would pray that the findings of the jury, the Magistrate Court and the Circuit Court be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
APPELLEE,

BY COUNSEL:


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CERTIFICATE OF SERVICE

I, Dennis V. DiBenedetto, Prosecuting Attorney for Grant County, do hereby certify that I have served a true copy of the above BRIEF OF APPELLEE STATE OF WEST VIRGINIA upon the Appellant by mailing same to Leah Perry Macia, his counsel, at her address of P. O. Box 273, Charleston, West Virginia, 25321-0273, by United States Mail, postage prepaid, on this the 24th day of November, 2010.


Dennis V. DiBenedetto