

IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff/Respondent,

vs.

FREDERICK K. FERGUSON, III

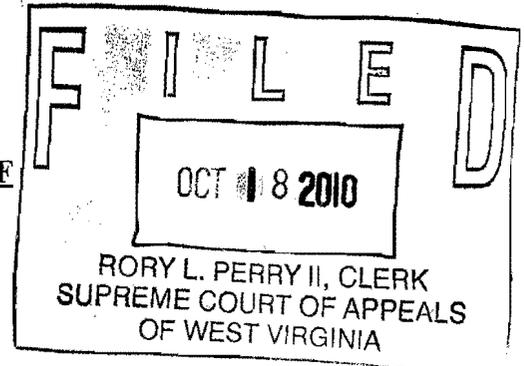
Defendant/Petitioner,

BRIEF FILED
WITH MOTION

APPEAL NO: 35551

CASE NO: 06-F-90
CIRCUIT COURT OF
OHIO COUNTY

PETITIONER'S REPLY BRIEF



TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA:

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HON. ROBIN J. DAVIS, JUSTICE
HON. MARGARET L. WORKMAN, JUSTICE
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INTRODUCTION

Now comes the appellant, Frederick K. Ferguson, III, and files this reply brief to the brief filed by the appellee, the State of West Virginia.

The original brief filed by the appellant sets forth three main issues. One of those issues, the second issue, has several component parts. This reply brief addresses the issues in the same order as the original brief, and the response filed by the appellee. Rather than rehash the arguments in full, this brief synthesizes the key points made by the State and provides a brief reply to the positions taken by the State.

PRELIMINARY OBSERVATIONS

Before turning to the issues, a few comments about the State's version of the facts is in order. The State contends that Mr. Ferguson decided to "confront" Mr. Sears when Mr. Sears threatened to kill Mr. Ferguson. That verb represents a conclusion, not a fact. Mr. Ferguson explained that he did not call the police, or ignore Mr. Sears. He went to "reason" with him. Mr. Ferguson went to explain that he had no claim on Ms. Gorayeb, and would leave Mr. Sears to resolve his relationship with this girl to himself. While there was an incident, according to Mr. Ferguson, a confrontation was not his plan in going to meet Mr. Sears. While the State may be free to argue the meaning of the facts, the use of the word "confront" is not a fact, but instead, the end result of an argumentative process.

Second, the State asserts that seven named persons who saw various aspects of events failed to say Mr. Sears had a gun. It makes a great deal of the fact that Robert Hodge is the sole witness who identified Maurice Sears as the person who produced a gun as the confrontation began. But, Mr. Hodge unquestionably had the best view. He was in the truck that Mr. Sears

approached. He could have been shot by Mr. Sears. To find he recalled events differently than other witnesses is not to establish he was wrong. Other witnesses, those mentioned by the State, included people over a block away. The State refers to people whose only vantage point was to the rear of Mr. Sears. Some of these witness had their view of what happened in front of Mr. Sears blocked by his body. Numerosity does not outweigh quality.

ISSUE ONE

The trial was fundamentally flawed when the Appellant was denied the right to cross-examine Officer Brown about his false grand jury testimony.

A.

The testimony of Officer Brown during an in camera hearing was that he acknowledged testifying before the grand jury in reckless disregard for the truth. That is his testimony. But the State wants to argue he was wrong, and that the defense has somehow manipulated what occurred. This is an attempt to revise history in the face of a written transcript that borders on the ludicrous.

The grand jury testimony of Officer Brown was structured to obtain an indictment for the most serious charge possible, first degree murder. It seems clear that was the objective, regardless of the facts. The officer opined that Mr. Ferguson went home and obtained a gun. No witness put Mr. Ferguson in his home, although he did go near it. No witness explained what gun Mr. Ferguson returned home to obtain. While there was a gun at his home, it clearly had nothing to do with this incident.¹ The State can infer what it wants from facts, but that does not make inferences into facts. Suggesting the officer's testimony was true, when he admitted it was

¹ See note 7.

not, reveals the entirety of the problem in this case. The charging authorities, the police and the prosecution, pursued serious charges when not warranted by all the facts.

B.

The admission of evidence is often described as a matter of discretion. Consequently, review is most frequently under the abuse of discretion standard. However, the right to cross-examine is a right protected in the Sixth Amendment to the Constitution, and the State Constitution, as well. Constitutional rights cannot be ignored. Review of such claims is under the de novo standard. Cases for this proposition were cited in the original brief and have not been addressed by the State.

C.

The prosecution argues for a harmless error analysis. It does so without reference to the applicable standard. In Delaware v. Van Arsdale, 475 U.S. 673 (1986) the United States Supreme Court held that restrictions on cross-examination could only be considered harmless where the “damaging potential” had been fully realized. The State ignores this case, cited in the original brief, in its argument. Review under this standard will lead to reversal.

D.

The State argues that Officer Brown was not an important witness, and his credibility was not at issue. The burden of proof in a criminal case is on the State, and it is proof beyond a reasonable doubt. Officer Brown was important enough to be called as a witness.² He was

² Officer Brown failed to forward a coat to the medical examiner. The absence of the coat led the medical examiner to testify that Mr. Ferguson was more than 18 to 24 inches from Mr. Sears when Mr. Sears was shot. On cross-examination the medical examiner recanted this testimony when he became aware that the coat provided an extra layer of clothing that would have interfered with powder burns in the same way that distance would have avoided the

important enough to be cross-examined. He wasn't cross-examined thoroughly. That was error. It was error of a constitutional dimension.

E.

The Appellant has noted that part of the need to cross-examine Officer Brown was to expose a "rush to judgement" by the "police and prosecution". Original brief at page 10. The State argues that after Mr. Ferguson was arrested, there was no further "rush to judgement." Mr. Ferguson was deliberately overcharged. He was overcharged by offering evidence to the grand jury of opinions not supported by facts. He was overcharged by denying the existence of exculpatory evidence. That is a rush to judgement, and worse.

ISSUE TWO (a) and (b)

The trial was fundamentally flawed when the Appellant was deprived of the right to introduce evidence (a) that the decent, Maurice Sears, had MDMA in his rectal cavity when shot, (b) that DMA would contribute to paranoia and aggression in users, even where MDMA is undetectable in the blood, and

A.

While a trial is about facts, it has long been realized that even the most objective effort to present facts is based on perceptions. Experience with other events has an impact on perception. Consequently, an observer attempting an objective presentation of facts is, to some extent, offering an opinion. West Virginia Rule of Evidence 701, which concerns lay opinion testimony, acknowledges this truth. It makes admissible opinions that are rationally based on perception and helpful to a clear understanding of the testimony.

occurrence of powder burns. The Officer was not a "little" witness.

The admissibility of expert testimony is governed by West Virginia Rule of Evidence 702. It makes admissible testimony of scientific, technical, or other specialized knowledge that would assist the trier of fact to understand evidence or determine a fact in issue. Since Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993), cert. denied, 511 U.S. 1129 (1994), there has been an intense focus on the meaning of the word, scientific. There has been an effort to distinguish “good” science from “junk” science. While that is important, the real focus of Rule 702 remains whether opinion evidence would really assist a fact finder in the task at hand. Mostly, the rule has favored admissibility. Our system of justice believes in the ability of fact finders to focus on what is, and is not, important.

The reason for this is apparent from Rule 702 itself. The kinds of opinions which are admissible are not limited to scientific evidence. Instead, the rule permits about testimony about issues that are scientific, technical or involve other specialized knowledge. These are not pigeon holes. This is a continuum. The focus remains on what specialized information would aid a juror.

The State argues that the conclusions of Dr. Sullivan were speculative. Dr. Sullivan is a psychiatrist. He treats people addicted to drugs at Chestnut Ridge Hospital. He teaches medicine in this subject area at the WVU Medical School. He is knowledgeable about methyldioximethamphetamine (MDMA or ecstasy).

He reported the “state of the art” of medical science concerning this drug. MDMA has similarities to serotonin that are more discretely understood. The state of the art in medical science is that double blind studies on the effect of MDMA on humans are not being conducted. A lot of medical literature reports “case studies” and animal studies. Based on the information

available, including his own treatment of patients, Dr. Sullivan opined that a person with aggressive and/or paranoid personality characteristics would become more so as a result of chronic³ exposure to MDMA. He held these opinions to a reasonable degree of medical certainty.

Still his testimony was excluded on the grounds that it was not “reliable” scientific evidence. Dr. Sullivan had a foundation for his opinion that is outside the ken of the average lay juror. Such testimony would have aided a jury in decision-making. This is the heart of the why such testimony was admissible.

The ultimate issue in a criminal case is whether the State has proof, beyond a reasonable doubt, that a defendant has committed all the elements of the charged offense. While the Rules of Evidence are the same in a civil case as in a criminal case, the trial judge recognized that a criminal case was different. Transcript Excerpt at 39. A defendant should be entitled to offer admissible evidence that suggests reasonable doubt exists, even where the proffered evidence does not itself establish a specific alternative.

Here the “state of the art” of the medical evidence would, in combination with other facts, have provide a real insight about the personality of Mr. Sears. That insight would have cast doubt on the State’s hypothesis that Mr. Ferguson went to the scene to harm Mr. Sears, and not to resolve issues with him. It rationally suggested that Mr. Sears had a chemically enhanced aggressive and paranoid attitude that left him itching for violence.

On the remaining issue of chronic use, the defendant had some evidence of use of ecstasy

³ He defined chronic exposure as use at sporadic intervals over a minimum period of three months.

by Mr. Sears, although admittedly not for a three month period. But the quantity of pills, a distribution quantity, supported the additional inference that Mr. Sears had ready access to MDMA and was a regular user. The State's remedy was not to bar evidence, but to offer contradictory evidence, if it existed. A fact finder should have been permitted to evaluate this information. The trial court rejected the reasoning of Justice Davis in her opinion in State ex rel. Jones v. Recht, ___ W.Va. ___, 655 S.E.2d 126(2007).⁴ This was error.

B.

In an effort to confuse the question of reliability under W.Va. Rule of Evidence 702, the State has attempted to argue for the first time that the MDMA evidence was inadmissible under W.Va. Rules of Evidence 403.⁵ In doing so, the State continues to refuse to consider the possibility that Mr. Ferguson's explanation that he went to meet with Mr. Sears to resolve a the irritation perceived by Mr. Sears. That irritation had, or course, caused Mr. Sears to threaten to kill Mr. Ferguson, and others he cared about. While not rational, it appears that Mr. Sears was determined to act violently in any such meeting. The evidence about MDMA would have provided insight into the unyielding attitude of Mr. Sears. There was little prospect of jury confusion. There has never been an attempt by the State to explain how it would have been prejudiced.

C.

While the defendant's primary basis for offering the MDMA had to do with the status of

⁴ The trial judge in the instant case was the respondent judge in that case. Not surprisingly he referred to Justice Davis's opinion by the names of the parties to earlier decision, Naum v. Jones. TT Excerpt at 39.

⁵ The trial court assumed the evidence was relevant. TT Excerpt at 39.

Mr. Sears as the first aggressor, the evidence has an impact on Mr. Sears attitude. He was an unyielding first aggressor. The evidence was relevant to this aspect of the case despite the State's attempt to claim it was not an issue. Neither was this evidence cumulative, an objection not contemporaneously made by the State.

ISSUE TWO (c)

The trial was fundamentally flawed when the Appellant was deprived of the right to introduce evidence (a) that the decent, Maurice Sears, had MDMA in his rectal cavity when shot, (b) . . . , and (c) that drug dealers are likely to carry firearms.

A.

The State concedes that the defendant had evidence that Mr. Sears was a drug dealer, although it asserts such evidence was "thin." It then suggests that the defense notion that drug dealers are likely to carry guns, and that Mr. Sears likely did so on this occasion requires a "speculative leap." This is odd. On numerous occasions, police officers have obtained warrants in Ohio County to search for firearms in the possession of drug dealers. The collective experience of these officers is that there is probable cause to believe drug dealers carry guns. Appellate courts have repeatedly found firearms are "tools of the trade" of drug dealing. Probable cause is little more than a recitation that a fact is more probable than not. That, of course, is the definition of relevant evidence in W.Va. Rule of Evidence 401. All relevant evidence is admissible. W.Va. Rule of Evidence 402.

Who brought the gun that killed Mr. Sears? This question is key to understanding what happened. If as the State contends, Mr. Ferguson brought the gun, his intent to do violence might

have been warranted. But the State's contention is founded in gossamer.⁶ It offered no evidence the defendant owned a gun of the relevant caliber or possessed a gun of the relevant caliber.⁷ It contended he "could have" had one.

In contrast, the defense suggested that as a drug dealer, Mr. Sears should have had a tool of his trade when he assaulted Mr. Ferguson. Mr. Hodge said Mr. Sears had a gun. He had the best vantage point to see if that was so. Some evidence is better than none. The defense was deprived of the evidence it had, when the State had none. This altered an important balance on a contested issue at trial. This was error.

B.

The credibility of Mr. Hodge was for the jury. Whether he was, or was not credible, has no role in the evaluation of the admissibility of other evidence. Mr. Hodge may have proven far more credible, if the jury had known that Mr. Sears was a drug dealer with MDMA in his rectal cavity.

ISSUE THREE

The trial was fundamentally flawed by the exclusion of evidence that Mr. Sears had previously beaten several girlfriends.

The State cites State v. Woodson, 181 W.Va. 325, 382 S.E.2d 519(1989). That case has

⁶ The State wholly ignored Mr. Hodge's explanation that Mr. Sears was armed. Instead, because no one else in the vicinity (some a block away, some behind Mr. Sears) could recall seeing Mr. Sears with a gun, the State inferred Mr. Sears did not have one. Based on that inference, the State contended Mr. Ferguson must have brought the gun.

⁷ After Mr. Ferguson's arrest, the woman he lived with pawned a gun that had been kept in their home. That information was given to the police when defense counsel learned of it. The firearm was recovered by the police. It was determined not to be the murder weapon. But for this evidence, there is no evidence the defendant owned or possessed a gun, ever.

been superceded by the holding in State v. Mitchell, 214 W.Va. 516, 590 S.E.2d 709 (2003). The evidence of specific incidents is admissible under Mitchell. The defendant was deprived of admissible evidence. That is error.

CONCLUSION

The conviction must be reversed. The Appellant has asked that retrial be barred, and continues to seek such relief.

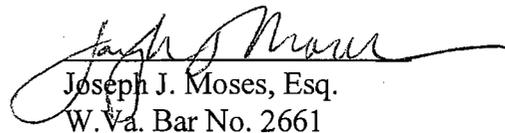
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, MARTIN P. SHEEHAN, do certify that service of the PETITIONER'S REPLY BRIEF was served upon the following by HAND DELIVERING a copy thereof, this 17th day of October, 2010.

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