

## IN THE CIRCUIT COURT OF GRANT COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

Case No. 09-MAP-1  
Judge Lynn A. NelsonJOSH LEE HEDRICK,  
Defendant.SUPPLEMENTAL OPINION ORDER DENYING APPEAL

Now comes this Court, the Honorable Lynn A. Nelson presiding, and would supplement the prior Order of this Court denying the appeal of the Defendant as follows.

The Defendant, Josh Lee Hedrick, was convicted after a jury trial in the Grant County Magistrate Court for one count of Interfering with a Lawful Fisherman in violation of W.Va. Code § 20-2-2(A). The Defendant has alleged ten points of error from the proceedings in Magistrate Court and each shall be separately addressed.

1. **Defendant's Motion for View was properly denied.** Under W.Va. Code §56-6-17, "[t]he jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision..."; during the trial below, Magistrate Ours denied the Defendant's request for a view. This Court must review that decision under an abuse of discretion standard. The Defendant contends that on the eve of trial he had returned the area surrounding the spring into "almost the exact position it was in on the day of the offense charged." *Defendant's Petition for Appeal*, para. 1. As a basis for this return the Defendant used photographs taken on the day of the offense charged to recreate the scene. The Magistrate ruled that the photographs (the same photographs the Defendant had used to return the scene to its approximate appearance) would be admitted into evidence and a view was not necessary. Defendant contends that a view of the property would have allowed the jury to

“see where the alleged offense took place and be able to tell what happened on the day of the offense” *Id.*

The law gives presiding judges discretion when allowing the jury to conduct a view of an area that was the scene of a crime. A trial judge’s decision “permitting the jury to view the premises is in the discretion of the court, and will not be reviewed where no abuse is shown.” Bond v. National Fire Ins. Co. 77 W.Va. 736, 88 S.E. 389 (1918). The Defendant has not presented any compelling information at the appellate stage that would allow this Court to find that an abuse of discretion had occurred. The fact that Defendant has conceded both in oral argument and in the Petition for Appeal that the property had to be returned to its condition – or almost the exact condition - on the date of the offense based upon pictures taken on the date of the offense causes this Court great reservation as to the accuracy of the representation of the scene. Inasmuch as a “[j]ury may consider view of premises the same as any other evidence,” Butler v. Smith's Transfer Corp., 147 W.Va. 402, 128 S.E.2d 32 (1962), a view of an area that had to be recreated for that purpose (in addition to the passage of time and differing appearance in vegetation<sup>1</sup>), it is certainly reasonable for the lower court to deny a view based on these grounds. Inasmuch as the Magistrate did not commit an abuse of discretion in denying the view, this Court will not disturb the decision of the lower court.

2. **The Court correctly concluded that the Defendant did not have exclusive control over the spring and the runoff therefrom.** The Defendant has relied on two previous Supreme Court of Appeals of West Virginia cases for his assertion that he had exclusive control over the spring and resulting stream. Claiming first that the stream is an impoundment, the Defendant relies upon the Ours, et als. v. Grace Prop., Inc., 186 W.Va. 296, 412 S.E.2d 490

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<sup>1</sup> The offense occurred in October 2008. The jury trial did not take place until July 2009. Obviously the wooded and open areas surrounding the spring had a different appearance based upon the season.

(1991), for the proposition that the Defendant and his family had exclusive control of the waters over the land owned by his parents irrespective of the rights of other landowners that bordered the stream. This Court simply cannot accept the Ours decision as controlling in this matter.

In the Ours case, the Court clearly stated in the single syllabus point that:

Where ownership of the land underlying a man-made lake is clear and distinct, the owner of a portion of the lake bed has the exclusive control and use of the water above the portion of the lake bed that he owns. Further, the owner has a right to exclude others, including other adjoining owners of the lake bed, by erecting a fence or other barrier to prohibit others from utilizing the water which overlies his property. Id.

The problem the Defendant has in applying the Ours case to this situation is that the Ours decision wholly dealt with a man-made lake and not a free flowing stream as is the case in this matter. Defendant alleges that there exists impoundments on the stream that make it akin to a man-made lake, however, common sense dictates that this stream is not a man-made lake. The first impoundment the Defendant alleges that blocks the stream is the box culvert installed by the Department of Highways to allow the stream to pass under the highway. This Court does not believe a box culvert to qualify as an impoundment that would convert this stream into a man-made lake. The remaining three alleged impoundments were installed<sup>2</sup> by the Defendant downstream from the box culvert prior to the stream entering the North Fork of the South Branch of the Potomac River and are constructed waterfalls. The Court likewise does not believe that simply calling these structures impoundments are sufficient to change the status of a stream to a man-made lake in order to make the Ours case apply. Furthermore, Defendant admits that the

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<sup>2</sup> The evidence showed that although Defendant's request to construct waterfalls in the stream had been approved by the U.S. Army Corp of Engineers, the Defendant improperly installed the waterfalls using poured concrete rather than stone as he was permitted to do. The Court cannot in good conscious let the Defendant now claim his waterfalls to be permanent impoundments simply because he violated the conditions of his permit and constructed the waterfalls out of an improper material.

stream crosses a portion of property owned by the Phares family and the West Virginia Department of Highways likewise has a right of way that runs through the stream bed before the stream crosses the highway, same being the prior location of the highway. Clearly the Defendant and his family are not the sole owners of the stream and as such the Defendant is not entitled to exclusive control over the entire stream including the portions that cross the lands of others.

Furthermore, the Defendant questions whether Mr. Reid had the right to fish in the stream and by extension whether the State has authority over the stream inasmuch as the Defendant contends that the stream is not a navigable stream as defined in Burner v. Nutter, 77 W.Va. 256, 87 S.E. 359 (1915) and is therefore not subject to State control. The Court is satisfied that the stream in this case is subject to state control. Defendant admits that he had previously submitted to the permitting requirements of the U.S. Army Corp of Engineers with respect to waterfall construction in the stream. It is illogical for the Defendant to now claim that this stream does not meet the requirements for state/federal control when he has submitted to the regulations promulgated by these entities for navigable waterways. Additionally, Mr. Reid was present fishing along the stream that date with the permission of the Phares landowners who unquestionably had the right to control access to the stream. Accordingly, the Magistrate Court committed no error.

3. **The State met its burden of proof with respect to the status of Mr. Reid as a lawful fisherman.** The Defendant contends that Mr. Reid was not a lawful fisherman based upon the facts adduced at trial relating to the amount of time it took to catch the trout in question. The State presented evidence that Mr. Reid had a valid fishing license with a trout stamp and had accessed the stream, with permission, from the Phares landowners. The Defendant was allowed to present his theory to the jury regarding his assertion that Mr. Reid could not have caught the

fish in the manner he described and the jury ultimately rejected his contention. Accordingly, the factual determination by the jury will not be disturbed and there is sufficient evidence presented by the State to support the jury verdict.

4. **Magistrate Ours did not error in refusing to grant the Defendant's Motion to Dismiss/Directed Verdict.** For the reasons previously stated regarding Mr. Reid's status as a lawful fisherman, the State presented ample proof to meet its burden regarding Mr. Reid's status at the stream that date. Accordingly, Magistrate Ours did not error.

5. **Magistrate Ours did not error in allowing the introduction of evidence by the State that the Defendant did not have a license to spawn trout.** The Defendant contends that the evidence of the Defendant's lack of a license to spawn trout was unnoticed 404(b) evidence. However, at the time of introduction of the evidence, the Defendant did not object and therefore did not properly preserve this issue on appeal. Although the matter was not presented to the Magistrate Court for argument, this Court fails to see how this evidence would have been excluded inasmuch as the Defendant's claim of a trout spawning operation was intertwined with his defense claim that Mr. Reid was catching his fish. Therefore, this Court believes that this information would have been admissible.

6. **Magistrate Ours did not error in denying the Defendant's renewed Motion to Dismiss/Directed Verdict at the conclusion of the trial.** For the reasons above stated, Magistrate Ours appropriately allowed the jury to decide this matter inasmuch as the State had presented sufficient evidence to satisfy its burden of proof.

7. **Defendant's Jury Instruction Number 1 was properly refused because it did not state law applicable to this case.** This jury instruction was pulled from the Ours decision

which, as has been previously discussed, does not apply to this situation. The Supreme Court of Appeals of West Virginia has held, with respect to jury instructions that

“[i]t will be presumed that a trial court acted correctly in giving or in refusing to give instructions to the jury, unless it appears from the record in the case that the instructions were prejudicially erroneous or that the instructions refused were correct and should have been given.” Syl. pt. 1, State v. Turner, 137 W.Va. 122, 70 S.E.2d 249 (1952).

In addition to the Court being unconvinced that the Ours case even applies, the wording of the instruction is inappropriate inasmuch as the instruction insinuates that the point of law it stands for is applicable to a stream of this type and wholly omits the words man-made lake from the syllabus point stated in the decision. Accordingly, the Magistrate did not abuse his discretion and appropriately refused to give this jury instruction.

8. **Defendant’s Jury Instruction Number 2 was properly refused because it was misleading to the jury.** In Syllabus point 4 of State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), the Supreme Court of Appeals of West Virginia observed that:

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. Syl. pt. 4, *in part*.

In the current situation, the Magistrate refused to include Defendant’s Jury Instruction Number 2. Upon reviewing the proposed instruction, this Court does not believe the Magistrate abused his discretion based upon the facts placed into evidence by the parties. Defendant’s jury instruction number 2 is statement of the law from the Burner decision regarding navigable waters. However, the instruction is misleading given that it instructs the jury that “[i]f a stream

is not navigable, it is subject to the control of the owner of the land thereunder.” This proposition would not be controlling in this situation where the underlying criminal charge is interfering with a lawful fisherman. The evidence adduced at trial showed that the Defendant did not own the entire streambed – a fact that the Defendant does not contest. The evidence likewise showed that Mr. Reid gained access to the stream over the Phares land and with permission from the Phares family. Accordingly, presenting the jury with the statement that the navigability of the stream is the controlling question as to access is not accurate where the Defendant did not control the entire streambed. Therefore, the Magistrate did not abuse his discretion in refusing this instruction because it was not a correct statement of the law in the context of this case and would have been misleading to the jury as to the appropriate standard of proof.

9. **Magistrate Ours properly denied the Defendant’s Motion for Directed Verdict of Acquittal notwithstanding the verdict.** The Defendant was convicted by a jury of his peers and the Magistrate had no reason to disturb the verdict.

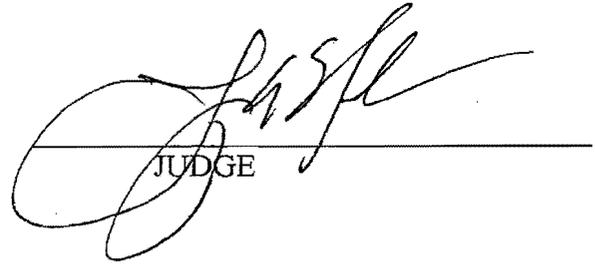
10. **The motion for new trial was properly denied by the Magistrate because the Defendant presented no information that would indicate any impropriety in the jury trial or process.** The Defendant was obviously upset with the outcome of the trial, however, the Defendant was not entitled to a new trial and has been afforded his appellate rights in this matter.

**ACCORDINGLY**, the Petition for Appeal filed by the Defendant in this matter is **DENIED**. The Circuit Clerk is directed to provide a copy of this Order to all Counsel of record and remove this matter from the docket and place it among the actions ended.

Rec. Bk 20  
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ENTERED this 17<sup>TH</sup> day of September 2009.

  
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JUDGE