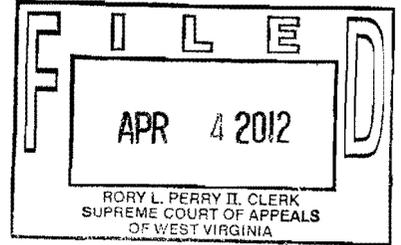


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA  
Respondent,

Vs.

No. 101413



LARRY MCFARLAND,  
Petitioner,

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PETITIONER LARRY MCFARLAND'S REDACTED REPLY TO  
RESPONDENT'S RESPONSE AND BRIEF

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## REPLY TO ARGUMENT

Petitioner Larry McFarland respectfully replies to the arguments set forth in the Respondent's Response to Petitioner's Assignments of Error as follows:

A. CIRCUIT COURT IMPROPERLY DENIED A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE

As conceded by the Respondent, no direct evidence was presented at trial to establish the guilt of Petitioner Larry McFarland. Upon reviewing the Respondent's response and the record before the Court, Petitioner's motion for judgment for acquittal should have been granted.

The Respondent does properly concede that "guilt beyond a reasonable doubt cannot be premised on pure conjecture." *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). However, the State improperly attempts to argue that the evidence presented at Petitioner's trial "moved from the area of conjecture to proof" without offering any persuasive argument to support said position.

A simple review of the record makes it clear the Respondent was only able to sustain a conviction based upon the improper use of 404(b) evidence. As noted in said response, one of the elements to be established at trial was whether the victim was "physically helpless at the time of the sexual intercourse or intrusion." (Respondent's brief, pg. 13). However, the State failed to present evidence of the same and simply relied upon the premise that because the alleged victim did not remember having sex with Petitioner that the Petitioner must be guilty. In its response, the Respondent improperly theorizes that because the victim did not remember having sexual contact with Petitioner

that the alleged victim was “physically helpless.” However, no evidence was entered at trial to establish that the victim in this matter was “physically helpless.”

In its response, the State primarily relies on two primary factual scenarios offered at trial to support affirmation of the conviction: Petitioner’s alleged statements to law enforcement and the fact that the Petitioner’s semen was found on the victim’s clothing. (Respondent’s brief, pg. 15).

First, Petitioner’s alleged statements to law enforcement officers were most likely taken out of context and should not be considered credible. From the record, it is clear that none of the conversations between Detective Harrison and Petitioner were ever recorded. (1/25/2010 p. 246-252). Respondent attempts to argue that during the May 22, 2008 communication, that because Petitioner allegedly repeatedly told Detective Harrison that “I did not touch that girl, I did not have sex with her” that these statements should somehow be considered evidence of guilt. (1/26/2010 p. 249). As noted by Detective Harrison on direct examination, when said officer first spoke with Petitioner she was intentionally “very vague about the details” as to why she was interviewing him. (1/26/2010 p. 249). If Petitioner did make these statements, the same are not persuasive evidence of guilt as, from all accounts, the Petitioner did not have sex with the victim. (1/27/2010 p. 177).

In regards to the statement that he “did not touch that girl”, Petitioner affirmatively states that he did not make this statement or that it was taken out of context. Obviously, a statement of this nature could be construed to mean that he did not “forcibly rape” the victim. However, the better rebuttal to said assertion is that the officer,

testifying close to two years after the statements were made, construed said statements in the manner she saw best assisted in obtaining a conviction.

On April 15, 2008, after certain DNA testing had been completed, the next statement the Respondent relied upon was allegedly made by Petitioner after Detective Harrison had shown up to arrest him and Petitioner asked “are you going to take me today, and I replied yes, and then he said that the DNA results came back.” (1/26/2010 p. 257). Obviously, this statement should not be considered incriminatory if it was actually made, because it is possible he simply wrongfully perceived that DNA results were necessary for conviction or the officer told him that said DNA tests were being completed. However, Petitioner claims that this statement was never made. (1/26/2010 p. 220-222). Of course, had these conversations been recorded or independent evidence of the same been offered at trial, the issue would have been properly resolved.

On cross examination, Petitioner had quite a different accounting of the “interviews” had between himself and Deputy Harrison and testified as follows:

Q. Okay. Well, that is interesting because what did you tell Detective Harrison on May 22<sup>nd</sup> when Detective Harrison asked you if you had sex with E.B. you said, no, I never had sex with that girl, didn’t you?

A. I never said nothing. She tried to put a lot of things a lot of wards I haven’t said, especially at the State Police barracks, she kept saying, she swore up and down, you mother efffer, you did do it, then she told me she never said that, she did, mother effer. ...

(1/27/2010 p. 204).

Second, the fact that a small portion of Petitioner's semen was found on a small portion of the victim's pants is not a sufficient fact to affirm the Circuit Court's denial of Petitioner's motion for judgment of acquittal. Petitioner readily admits that he engaged in oral sex acts with the victim and that the DNA evidence came from said consensual acts. (1/27/2010 p. 204). At trial, Respondent speculated the DNA evidence came from Petitioner "penetrating" the victim with his hand and then ejaculating on her pants. (1/27/2010 p. 210). However, the testimony of the State's expert, Lieutenant Myers, confirmed that *none* of Petitioner's DNA appeared on the vaginal swab of the victim but that only DNA from Petitioner's husband appeared. (1/26/2010 p. 144). Further, the said expert testified that she only found Petitioner's sperm on the victim's jeans. (1/26/2010 p. 154). The DNA evidence offered at trial did not prove that Petitioner had penetrated the victim with his hand and ejaculated on her and should not be considered evidence of sexual assault as the same DNA could have been obtained from consensual sex acts like oral sex.

The only other factual evidence presented at trial that the Respondent attempts to rely upon was the testimony of the Sexual Assault Nurse Examiner. Although the Respondent seeks conviction under the completely contradictory theory that the victim was "physically helpless", in its response, Respondent argues that said witnesses' testimony should be given weight because it proved that the alleged victim had no injuries from a "consensual sexual encounter." (Respondent's brief, pg. 14). This contradiction is another striking example of how the Respondent was allowed to convict the Petitioner with nothing more than improper 404(b) evidence and pure conjecture and completely conflicting theories. Also, it should again be noted, that the Sexual Assault

Nurse examiner testified on cross that all of the evidence of trauma found could have been the result of the consensual sex between the victim and her husband three days earlier. (1/27/2010 p. 113).

A simple review of the Respondent's response in the proceeding proves that the State had absolutely no evidence to prove that Petitioner sexually assaulted the alleged victim in this case while she was "physically helpless."

**B. CIRCUIT COURT IMPROPERLY ALLOWED RESPONDENT TO INTRODUCE 404(b) EVIDENCE AT THE TRIAL OF PETITIONER**

It was improper for the Circuit Court to admit 404(b) evidence in this case as the State failed to establish all of the necessary prongs of the test set forth in *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The acts used to improperly convict Petitioner by way of 404(b) evidence were not relevant to the singular charge before the court and were only entered to inflame the jury and improperly convict the Petitioner. Pursuant to Rules 401 and 402 of the West Virginia Rules of Evidence, the proposed 404(b) evidence can not be considered relevant. However, if determined to be relevant, the strictures of Rule 403 of the West Virginia Rules of Evidence must be followed and a balancing test must be completed before admissibility is determined.

Rule 403 of the West Virginia Rules of Evidence states as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The acts admitted in trial for purposes of 404(b) evidence were over fifteen years old and were not relevant. However, if determined to be relevant, the Circuit Court still

committed reversible error in allowing this evidence as it is clear that the “probative value” of the same was “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” As noted above, there was no direct evidence admitted at trial that could have sustained a conviction against Petitioner. The Respondent’s entire theory is based on speculation that the evidence before the Court establishes that Petitioner inserted his had in the victim’s vagina and ejaculated. However, as noted above, the evidence in this case did not establish this act occurred or that if it did occur, that it was not consensual.

Again, Respondent was allowed to admit evidence of the past crimes from a cold record by having her investigating officer read from certain documents that were later admitted into evidence. (1/27/2010 p. 263-270). Not only was the information itself substantively improper, but the procedure itself was improper to allow these convictions to be read and reviewed by the jury without any more supporting evidence. If anything, this Court must further address the procedures for admitting 404(b) evidence as the method by which said evidence was admitted at this trial cannot be considered proper.

The Respondent argues that the 404(b) evidence was properly offered to show “motive”; however, the admission of the evidence clearly resulted in “unfair prejudice, confusion of the issues, or misleading the jury.” The jury was not presented independent evidence of guilt and was clearly compelled by the improper and irrelevant evidence of crimes from the Petitioner’s past.

**CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth above, Petitioner respectfully requests that the judgment of the Circuit Court of Jefferson County be reversed. Any arguments not addressed in the instant reply were intentionally withheld as they were sufficiently briefed in Petitioner's initial brief.



Respectfully submitted,  
Larry A. McFarland,

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CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Redacted Reply upon the following persons, by first class mail, postage prepaid, and email on this 2nd day of April, 2012:

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