

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

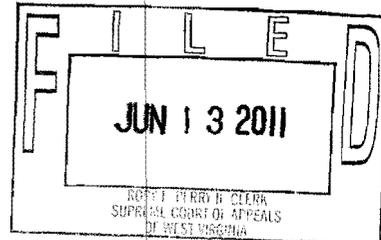
Respondent,

v.

Supreme Court No. 11-0362
Circuit Court No. 09-F-136
(Fayette County)

HENRY C. JENKINS,

Petitioner.



RESPONDENT'S BRIEF

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STATEMENT OF CASE

On November 19, 2008, C.C.J., at the age of fifteen, died at Women and Children's Hospital in Charleston, West Virginia. C.C.J., who suffered from cystic fibrosis, was later determined to have oxycodone and valium in his blood stream by autopsy. C.C.J. was not prescribed the aforesaid prescription medications and the medications were determined by the State Medical Examiner's Office to have contributed to the death of the child victim.

At the time of the child's death, he resided with his father, the appellant, Henry C. Jenkins, in a mobile home in Fayette County, West Virginia. The child's mother, Naomi Griffith, was incarcerated for various paper crimes at the time of his death. The evidence adduced at trial revealed that the appellant was a frequent abuser of prescription pain medications. Based on recorded phone conversations between the appellant and the victim's mother, the appellant admitted to having given the victim prescription pain medications which were not prescribed in the past and to having given the victim the oxycodone medication which was in his system at the time of his death.

The night before the victim died the testimony adduced at trial revealed that the appellant traded the victim's Jeff Gordon collectible collection for three (3) oxycodone pills from a drug dealer operating just north of Oak Hill, West Virginia. Thereafter, the defendant consumed one of the pills, gave one to another individual named Holly Burdette and gave one to his son, C.C.J. This transfer occurred in the appellant's home. Although the events which followed at appellant's home are confusing, trial testimony indicated that the victim thereafter became ill and struggled to breath. Ms. Burdette woke up several hours after the pills were consumed and observed that C.C.J.'s condition was worsening and the appellant was on the phone and seemed unconcerned about his son's plight. Sometime later, the appellant placed the victim in a cold

bath trying to revive him, instead of promptly seeking medical attention. Eventually, the appellant did place a call to the Emergency 911 Center and an ambulance was dispatched. The ambulance personnel described the victim's skin color as blue and the victim was essentially not breathing upon arrival.

The victim thereafter lapsed into a vegetative state and subsequently died. The Medical Examiner subsequently determined that "It is our opinion that C.C.J., a 14 year old male teenager, died as the result of combined oxycodone and diazepam intoxication resulting in fatal hypoxic encephalopathy following a 5 day hospitalization, without documented prescription access to oxycodone and diazepam. Cystic Fibrosis and insulin dependent diabetes mellitus are potentially contributory conditions."

The appellant was tried and convicted of the felony offense of felony murder and child neglect resulting in death.

ISSUES PRESENTED BY APPELLANT

A. Whether the Court erred in allowing the State to proceed against the defendant for the offenses of "felony murder", the underlying felony being delivery of oxycodone; and "death by parent", the cause of death being "impairment of physical condition by delivery of oxycodone"; and "child neglect resulting in death" said neglect allegedly being "allowing or permitting child to abuse oxycodone"?

B. The prosecution's medical experts testified that the manner of death was "undetermined" and they were "not hundred percent sure" if controlled substances at a therapeutic level caused the death of the child. Consequently, the evidence that the appellant caused the death of the child fell short of proof beyond a reasonable doubt and the appellant's Motion for Judgment of Acquittal should have been granted.

C. Whether the Court erred in suppressing the defendant's statement only during the State's case in chief?

D. Whether the Court erred in allowing the State to utilize immaterial and gruesome photographs of the autopsy during its case in chief?

E. Whether the Court erred in permitting the use of 404(b) evidence of Ms. Griffith and Mrs. Paruscio against the appellant at trial?

ARGUMENT

A. Whether the Court erred in allowing the State to proceed against the defendant for the offenses of "felony murder", the underlying felony being delivery of oxycodone; and "death by parent", the cause of death being "impairment of physical condition by delivery of oxycodone"; and "child neglect resulting in death" said neglect allegedly being "allowing or permitting child to abuse oxycodone"?

The indictment in this matter charged the appellant with four felony crimes: "murder" in violation of W. Va. Code § 61-2-1; "delivery of a controlled substance" in violation of W. Va. Code § 60A-4-401; "death of a child by a parent" in violation of W. Va. Code § 61-8D-2a; and the offense of "child neglect resulting in death" in violation of W. Va. Code § 61-8D-4a(a), which was dismissed by motion of the State and not presented to the petit jury. The State elected to prosecute the appellant pursuant to the "felony murder" rule. Accordingly, the crime of "delivery of a controlled substance" was not given to the jury as a separate and distinct felony charge upon which a verdict of guilt could be returned.

Fundamentally, the appellant in the instant proceeding is making a double jeopardy argument pursuant to the Fifth Amendment to the United States Constitution. Although the

appellant references the obvious authority on the issue presented, Blockburger v. United States, 284 U.S. 299, (1932), the appellant fails to address how the longstanding law of this case relates to the instant matter. The holding in Blockburger stated that when, “the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Id at 304.

In order to prove the crime of murder by virtue of the felony murder rule the State was required to prove that the appellant, Henry C. Jenkins, in Fayette County, West Virginia, on or about November 14, 2008, did deliver oxycodone, a Schedule II narcotic controlled substance to Christian C. Jenkins, and that Christian C. Jenkins died as a result of the defendant committing the crime of delivery of a controlled substance. Conversely, to prove the crime of death of a child by a parent the State was required to prove that the appellant, Henry C. Jenkins, in Fayette County, West Virginia, on or about November 14, 2008, the parent of Christian C. Jenkins, did unlawfully, feloniously, maliciously and intentionally inflict upon Christian C. Jenkins, a child under his care, custody or control, impairment of physical condition, by other than accidental means, thereby causing the death of the said Christian C. Jenkins. Two obvious additional facts are required to prove the latter crime: 1.) That the defendant had care, custody or control of the victim; and 2.) That the death in question was by other than accidental means. If the State had failed to prove either of the aforementioned facts, a conviction could not have been had. However, the existence or non-existence of either one these facts would have had no bearing on a conviction for the murder of C.C.J pursuant to the felony murder rule.

B. The prosecution’s medical experts testified that the manner of death was “undetermined” and they were “not hundred percent sure” if controlled substances at a

therapeutic level caused the death of the child. Consequently, the evidence that the appellant caused the death of the child fell short of proof beyond a reasonable doubt and the appellant's Motion for Judgment of Acquittal should have been granted.

In order to adequately address the issue of causality as it relates to the appellant's argument, the facts must be fully and fairly addressed. The appellant not only admitted to the victim's mother that he "knew the juvenile had ingested oxycodone that night", but also he admitted that he gave the pills to the child on the occasion in question, as he had done on prior occasions. Furthermore, the evidence regarding Dr. Sabet's testimony deserves the proper context. The appellant contends that because the medical experts determined the drug level found in the decedent's blood to be at a therapeutic level, that it cannot be connected with the child's demise as compared to the facts in State v. Rodoussakis, 204 W.Va. 58 (1998). That position completely neglects the fact that the child in this matter did not have a normal level of health. Dr. Sabet and Dr. Kraner, the victim's treating physician, both testified that the drugs in the child's system would not and should not be prescribed to a patient suffering from cystic fibrosis. Dr. Sabet opined, "Cause of death for this 14 years old male teenager is combined oxycodone and diazepam intoxication, based on this organ failure, and cystic fibrosis associated with diabetes mellitus, which is what Type I is from the chart that he had, could be contributing factor to his death."

The thrust of the appellant's argument in reality challenges the sufficiency of the evidence upon which the jury based its verdict. The standard by which these types of challenges claims are judged in criminal cases is found in Syllabus Point 1 of State v. Starkey, 244 S.E.2d 219 (1978):

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's

evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

This Court in the case of State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), held that, “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.” This Court further explained in Syllabus Point 3 of Guthrie that:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

There is no indication that any irregularity existed with the jury in this matter. Furthermore, the evidence, in light of the standard of proof required, clearly was proper. In this case, in summary, the State presented evidence that the appellant traded the victim's belongings for oxycodone, delivered the pill to the child moments later in the appellant's home, as he had

done on prior occasions and the child later died with medical experts testifying that the oxycodone in the child's system was a causal factor in his death.

C. Whether the Court erred in suppressing the defendant's statement only during the State's case in chief?

The Appellee takes no issue with the court's ruling that precluded the use of the statement obtained by authorities in this matter for a variety of reasons. Notwithstanding the lower court's decision, the appellee, out of an abundance of caution, did not use for any purpose, the statement in question. Accordingly, the appellant is unable in the petition to illustrate any harm caused by the lower court's ruling, regardless of the legality of the decision. This inability renders the issue without merit and requires no discussion pursuant to the doctrine of mootness.

D. Whether the Court erred in allowing the State to utilize immaterial and gruesome photographs of the autopsy during its case in chief?

The appellee agrees with the appellant's recitation of the law. In addition to the Court's ruling in State v. Derr, 192 W.Va. 165 (1994) and the provisions of West Virginia Rule of Evidence 401 and 403. The analysis set forth in State vs. Rowe, 163 W.Va. 593 (1979), the first ruling by this Court in the modern era addressing gruesome photographs states in Syllabus Point One succinctly, "Gruesome photographs are not *per se* inadmissible, but they must have something more than probative value, because by the preliminary finding that they are gruesome, they are presumed to have a prejudicial and inflammatory effect on a jury against a defendant. The State must show that they are of essential evidentiary value to its case."

Initially, an explanation of the photograph in question is important to properly analyze the question. The photograph did not show the face of the victim, but rather the lower back portion of the victim. The picture did not show any blood, bones or gory aspect of the autopsy.

Rather, the photograph showed several scratches on the victim's back not unlike a scratch one might get from a thorn or similar vegetation. Based on the photograph, the viewer would not even know upon inspection that the subject of the photo was deceased without additional information. The photograph had no gruesome aspect whatsoever.

Additionally, the photograph was not admitted without reason. The testimony of Dr. Sabet was substantially corroborated and aided by the photograph. The doctor was able to not only describe what he observed and how his observation aided in forming an opinion, but was importantly able to show the jury what he saw. In summary, describing the photograph used in the trial of this matter as either grisly or horrific is not only without support, it is wholly absurd.

E. Whether the Court erred in permitting the use of 404(b) evidence of Ms. Griffith and Mrs. Paruscio against the appellant at trial?

West Virginia Rule of Evidence 404(b) Other crimes, wrongs or acts, states, "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

The West Virginia Supreme Court, has stated in interpreting Rule 404(b) that, "The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to

each other that proof of one tends to establish the others; and (5) the identity of the person, on trial, who is charged with the commission of the crime.” State v. Hanna, 180 W.Va. 598 (1989), State v. Dillon, 191 W.Va. 648, (1994). Additionally, the Supreme Court has established that the State must identify the specific purpose for which the evidence in question is offered, State v. McGinnis, 193 W.Va. 147 (1994). Pursuant to the Court’s ruling in McGinnis, the trial court should conduct the following test to determine admissibility of evidence offered pursuant to Rule 404(b) that the trial court, pursuant to Rule 104(a), is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in State v. Dillon. After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 and conduct the balancing required under Rule 403. If the trial court is then satisfied that Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. All of the aforementioned elements were satisfied by the trial court before the trial of this matter and the appellant was properly noticed, in writing, of the evidence in question and the purpose for which it was offered.

In the instant matter the appellee offered the evidence in question to prove that distributing controlled substances to the child victim in this matter was not in any way an accident on the part of the appellant. The trial court properly conducted an in camera hearing

where the appellant was informed both in writing and orally what the State's evidence would be at trial.

Based on the foregoing, the State of West Virginia prays this Court will deny the relief sought.

STATE OF WEST VIRGINIA
By Counsel



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CERTIFICATE OF SERVICE

I, BRIAN D. PARSONS, Assistant Prosecuting Attorney for Fayette County, do hereby certify that service of the foregoing *RESPONDENT'S BRIEF* was made by mailing and/or hand-delivering true copies thereof to Mr. E. Scott Stanton, Assistant Public Defender, 102 Fayette Avenue, Fayetteville, West Virginia 25840 by United States mail with postage prepaid, if mailed, on this 13th day of June, 2011.

A handwritten signature in black ink, appearing to read 'B. Parsons', written over a horizontal line.

BRIAN D. PARSONS