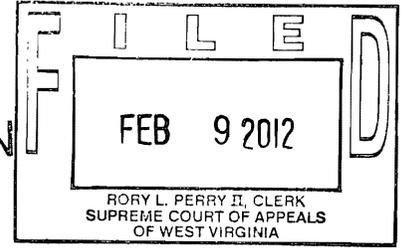


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS MCBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL
COMPLEX,

Petitioner,

BRIEF FILED
WITH MOTION



v.

Supreme Court No. 11-0853
Circuit Court No. 99-C-223
(Putnam)

JOSEPH H. LAVIGNE, JR.,

Respondent.

RESPONDENT'S REPLY BRIEF
ON
CROSS-ASSIGNMENT OF ERROR

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REPLY ARGUMENT

The Circuit Court Erred In Failing To Decide Two Of Mr. Lavigne's Constitutional Claims And Make Findings Of Fact And Conclusions Of Law As To Each Claim.

The State concedes the circuit court did not make findings of fact and conclusions of law on two of the issues raised by Respondent Joe Lavigne (Joe) in the habeas proceedings below as required by W.Va. Code §53-4A-7(c) (1994). Petitioner's Response Brief Regarding Cross-Assignment of Error (State's Response Brief) 16. The State, however, fails to acknowledge or address the Court's cases, cited by Joe in his Cross-Assignment of Error, page 43, indicating that this Court remands the case to the circuit court for such findings and conclusions when this occurs. Instead, the State asserts this claim of error should be rejected because the issues that were not properly addressed in the circuit court's order have no merit. State's Response Brief 16. Joe strongly disagrees.

First, as a matter of due process, Mr. Lavigne is entitled to have the circuit court make findings of fact and conclusions of law addressing the two constitutional claims, pursuant to the plain language of the post-conviction habeas corpus statute, W.Va. Code §53-4A-7 (c) (1994). Also, there was an evidentiary hearing with testimony from witnesses on both issues and proper findings of fact and conclusions of law should be made for this Court to review. To suggest this Court can bypass the requirement of findings of fact and conclusions of law on both constitutional issues completely subverts the procedural and substantive due process requirements of the post-conviction habeas statute.

Moreover, contrary to the State's assertion, the issues not decided by the circuit court do have merit. For example, Mr. Lavigne contended on the first issue that he was denied "the right of confrontation, due process, and the effective assistance of counsel when the trial court permitted the testimony of KLL, an incompetent witness, at trial." (A.R. Vol. 1, 34). The trial court's ruling that KLL was a competent witness was flagrantly wrong because it was not shown KLL was able "to recall events and to testify truthfully about them[.]" State v. Stacy, 179 W.Va. 686, 690, 371 S.E.2d 614, 618 (1988). Evidence from both attorney Harvey Peyton, KLL's *guardian ad litem*, and Dr. William Fremouw, the clinical psychologist at West Virginia University who evaluated KLL, indicated KLL was not competent to be a witness. See discussion of this evidence in counsel's post-evidentiary hearing memorandum of law in support of the second amended petition (Counsel's Memo). (A.R. Vol. 1, 130-31). Both indicated KLL's statements would be vague and inconsistent with prior statements. Id. See also A.R. Vol. 6, 87. Attorney Peyton further said Dr. Fremouw's evaluation and conclusion KLL is incompetent to be a witness reinforced his (Peyton's) and Dr. Joan Phillips' (KLL's physician) opinions "that KLL can't remember it and she won't talk about it." (A.R. Vol. 6, 88). KLL further refused to talk to defense counsel, Barbara Allen, before the trial. (A.R. Vol. 5, 63).

KLL's testimony at trial demonstrated her incompetence as a witness as she was unable to relate the events or details of the crime. See discussion in Counsel's Memo, A.R. Vol. 1, 132-33. On cross-examination, KLL "shut down" and it was evident she was not going to answer any more questions, according to defense counsel, Barbara Allen's, testimony at the habeas evidentiary hearing. (A.R. Vol. 5, 73-74, 80). Defense

counsel's testimony further confirmed that "KLL did not want to talk and did not talk about details of the incident[.]" (A.R. Vol. 5, 69-70). Defense counsel further indicated she was far from finished with her cross-examination of KLL and said there were other questions she wanted to ask KLL to establish Joe was not her assailant. (A.R. Vol. 5, 74, 80).

KLL's inability to remember and/or relate the events involving her assault is quite similar to the testimony of the five-year-old victim in State v. Stacy, 179 W.Va. 686, 371 S.E.2d 614 (1988). In Stacy, the young victim could not remember some events related to the assault and was unable to respond to some of counsel's questions. Id. at 690, 371 S.E.2d at 618. This Court noted that "[t]he ability to respond to questions is an inherent part of the ability to relate facts[.]" one of the four requirements for competency. Id. The Court further recognized "there was significant impairment of defendant's right to confront his accuser through effective cross-examination." Id.

The Stacy analysis is applicable here as Joe Lavigne was denied his right to cross-examine KLL when she "shut down" on cross-examination, making it impossible for defense counsel to ask questions and elicit answers which could establish Joe's innocence. For instance, defense counsel testified at the habeas evidentiary hearing that had KLL not "shut down," she would have questioned KLL (1) about her statement to Dr. Phillips that the assailant's had "black peachy" skin (A.R. Vol. 5, 75); (2) about her statements that the assailant's hair was "dark black" and was like Joe's before his haircut (A.R. Vol. 5, 76); (3) about the composite that was drawn based on KLL's description of the assailant showing a distinct goatee (A.R. Vol. 5, 77-78); (4) about her looking at her father when asked if she had seen her assailant before (A.R. Vol. 5, 78-79); (5) about her

pointing to her father when asked by the prosecutor who she told Dr. Phillips the assailant looked like (A.R. Vol. 5, 79); and (6) about what kind of a father Joe was to her, that Joe had never mistreated her, was always good to her, and showed her lots of affection. (A.R. Vol.5, 80).

Thus, had KLL not “shut down” as witness, there is a reasonable likelihood her answers to these questions would have persuaded the jury Joe was not her assailant. Accordingly, contrary to the State’s assertion, this issue involving KLL’s competency, which implicated Joe’s rights of confrontation, due process, and effective assistance of counsel, has substantial merit.

As to the second issue concerning the State’s presentation of false testimony that Mark Berry was on electronically monitored home confinement, it likewise has merit. The State obviously thought it was important to eliminate Mr. Berry as a possible perpetrator of the crime against KLL or it would not have presented the testimony Mr. Berry was on electronically monitored home confinement, which Joe proved at the evidentiary hearing was false. (A.R. Vol. 5, 256, 262). Given the lack of any credible evidence against Joe, the State’s elimination of other suspects like Mr. Berry that could have committed the crime likely played a significant role in the jury’s decision to convict Joe. See discussion in Counsel’s Memo, A.R. Vol. 1, 137-40. The State’s contention this issue has no merit must be rejected.

CONCLUSION

For the above reasons, Respondent Joe Lavigne respectfully requests this Court to remand this case to the circuit court for findings of fact and conclusions of law on the two

issues the circuit court failed to address, but only if this Court reverses the judgment of the circuit court on every assignment of error raised by the petitioner.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on this 9 day of February, 2011, a copy of the foregoing Respondent's Reply Brief On Cross-Assignment of Error was sent via U.S. Mail to counsel for petitioner, Mark A. Sorsaia, Prosecuting Attorney of Putnam County, West Virginia, Putnam County Judicial Building, 3389 Winfield Road, Winfield, WV 25213.



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