

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

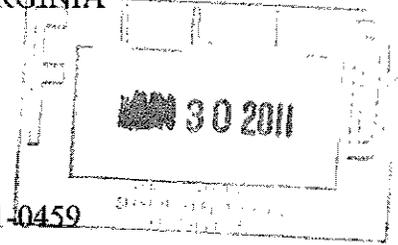
v.

DAVID L. WELCH,

Petitioner.

Supreme Court No. 11-0459

Circuit Court No. 09-F-162
(Fayette County)



PETITIONER'S REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner David Welch requests oral argument in this case because his appeal is not frivolous, the issues presented have not been authoritatively decided, and the decisional process would be significantly aided by oral argument.

Mr. Welch further requests a Rule 20 oral argument as one of issues raised in this appeal involves the trial court's abuse of discretion in summarily rejecting a plea agreement in an *ex parte*, out of court discussion with the prosecutor. This is an important issue regarding the proper interpretation of Rule 11, W.Va. R.Crim P., pertaining to the trial court's involvement in plea discussions which has not been authoritatively decided by the Court. The other two issues in the appeal, however, involve a claim of insufficient evidence regarding Mr. Welch's conviction for felony murder; and a plain error claim involving the erroneous admission of collateral crime evidence which the trial court failed to instruct the jury to disregard. These two issues do involve the application of settled law and but for the Rule 20 issue, would be appropriate for a Rule 19 argument and decision.

REPLY ARGUMENT

- I. **The Trial Court's Summary Rejection Of The Plea Agreement Offered By The Prosecutor And Accepted By The Defense, Before It Could Be Presented In Court And Appropriately Considered By The Court In The Exercise Of Its Sound Discretion, Was An Abuse Of Discretion. In Addition, The Trial Court's Rejection Of The Plea Agreement In An *Ex Parte* Discussion With The Prosecutor Outside The Courtroom Constituted Judicial Participation In Plea Negotiations.**

The State argues that because Mr. Welch did not enter a guilty plea, the trial court was not required to follow Rule 11 procedures when it rejected the plea agreement between the State and Mr. Welch. State's Brief 6. The State is correct the trial court's rejection of the plea

agreement between the prosecution and Mr. Welch was not part of a guilty plea presented to the court. However, that was only because the court rejected the plea agreement before it could be presented to the court the next day in writing as part of a guilty plea. The State's argument misses the fundamental point that the Rule 11, W.Va. R.Crim.P., procedure is the proper, designated vehicle for the trial court's consideration of a plea agreement.

Rule 11(e)(2), W.Va. R.Crim.P., expressly provides for the disclosure of a plea agreement in open court and Rule 11 (e)(2)(3) and (4) provide for the court's consideration and, if appropriate, acceptance or rejection of the agreement. For the court to accept or reject an agreement outside this procedure is clearly an abuse of discretion. This is because for the trial court to exercise its sound discretion, the trial court must be informed of the prosecutor's reasons for proposing the plea agreement as well as the circumstances surrounding the criminal episode and all relevant information concerning the background, prior criminal record, and involvement of the defendant. Syl. Pts. 8 and 9, Myers v. Frazier, 173 W.Va. 658, 319 S.E.2d 782 (1984). In this case, the trial court was not even told, *inter alia*, why the State made the plea offer before rejecting the plea agreement. Thus, the trial court could not properly exercise its discretion to accept or to reject the plea.

The State cites State v. Lopez, 197 W.Va. 556, 476 S.E.2d 227 (1996), to support its argument, but Lopez is factually different. State's Brief 6. In Lopez, the parties in a first degree murder case presented to the trial court in open court a plea agreement with a binding recommendation of mercy requiring the court to give the defendant mercy. Id. at 560, 476 S.E.2d at 231. Unlike the present case, the agreement was discussed by both parties with the circuit court at a hearing and there is no indication the court did not know why the prosecutor was making this plea offer when it indicated it could not accept such a binding agreement. In the

case at bar, there was no binding agreement, the prosecutor had an *ex parte* discussion with the trial court about it, and the court did not know why the prosecutor was making the plea agreement. This case presents a much more egregious situation than Lopez regarding the court's rejection of a plea agreement.

Additionally, the State fails to address State v. Sears, 208 W.Va. 700, 542 S.E.2d 863 (2000), where this Court found a trial court's summary rejection of a plea agreement to be an abuse of discretion even though, like Lopez, it was not part of a guilty plea. As noted in Mr. Welch's initial brief, the trial court in Sears summarily rejected a plea agreement between the prosecution and defense before it was presented to the court because it failed to comply with a local rule prohibiting plea agreements after pretrial hearings were concluded. Id. at 704, 542 S.E.2d at 867. This Court held the trial court must utilize discretion in its decision to accept or reject a plea agreement, and must consider the prosecution's reasons for making the plea offer. Id. at 705, 542 S.E.2d at 868. As in Sears, the trial court in this case summarily rejected the plea agreement without properly considering the State's reasons for making the plea offer and otherwise exercising its sound discretion to accept or reject the agreement.

This Court recognizes that plea "bargaining 'is an essential component of the administration of justice.'" Sears, 208 W.Va. at 703, 542 S.E.2d at 866 (quoting Santobello v. New York, 404 U.S. 257, 260, 92 S.Ct. 495, 498 (1971)). The prosecution and defense reached a plea agreement in this case after plea bargaining in good faith. For the trial court to summarily reject it without properly exercising its sound discretion in considering the plea agreement subverts the whole plea bargaining process and reasonable agreements reached by the State and the defense. As the Court said in Sears, Rule 11 "provides a detailed set of standards and procedures to govern the plea bargain process." Id. at 704, 542 S.E.2d at 866. A trial court's

failure to follow those procedures in rejecting a plea agreement must be considered an abuse of discretion. Otherwise, reasonable plea agreements between parties could be preliminarily rejected by the trial court without it exercising any discretion and the court could never be found to abuse its discretion because the defendant had not yet entered a guilty plea.

The Trial Court's Abuse of Discretion Was Not Harmless Error

The State contends that because Mr. Welch was offered another plea agreement which he rejected, he was not prejudiced by the trial court's improper rejection of the first plea agreement. State's Brief 7. Mr. Welch disagrees. What the State omits from its argument, State's Brief 7-8, is that the conditions of the second plea agreement were different from the first agreement. In the second plea agreement, the State added an additional count (four counts total) of second degree sexual assault, W.Va. Code § 61-8B-4(1991), which would have carried an additional prison sentence of 10 to 25 years, if run consecutively. (4/13/10 Tr. 107). Thus, the trial court's improper rejection of the initial plea agreement was not harmless error.¹

The Trial Court's Summary Rejection Of The Plea Agreement In An Out Of Court, *Ex Parte* Discussion With The Prosecutor Constituted Judicial Participation In Plea Discussions As It Nixed The Agreement And Returned The Parties To The Bargaining Table

The State argues that a trial court may let the parties know, outside of a Rule 11 plea hearing, that it disapproves of a proposed plea agreement. State's Brief 8-9. Mr. Welch disagrees. Rule 11(e), W.Va. R.Crim. P., is pretty clear that the court is prohibited from participating in any plea discussions. When the court indicates its disapproval of a plea agreement, outside the context of a Rule 11 plea hearing, the trial court is effectively participating in plea discussions. This is because the court's communication to the parties is no

¹ The initial plea agreement permitted Mr. Welch to plead to three counts of second degree sexual assault. (4/13/10 Tr. 6).

different than the parties' communication to one another in terms of its effect on the plea discussions. If one of the parties disapproves of a proposed agreement, the parties continue to negotiate. The same is true if the court disapproves – the parties must continue to negotiate. Thus, because the court's disapproval of a plea agreement has the same effect as if it were sitting at the table negotiating with the parties, the court is effectively participating in plea negotiations.

The State cites State ex rel. Roark v. Casey, 169 W.Va. 280, 283, 286 S.E.2d 702, 704 (1982), to support its argument the trial court did not participate in plea discussions. Roark, however, does not support the State's argument as the Roark Court, consistent with Rule 11(e)(4), W.Va. R.Crim. P., discussed the Court's authority to indicate why it is rejecting a plea agreement when it is considering a plea in an open court Rule 11 plea hearing. Id. That is an entirely different situation than what occurred in this case. The trial court here did not reject the plea agreement in a Rule 11 plea hearing, but instead in an out of court *ex parte* discussion with the prosecutor. Roark certainly does not authorize that.

II. The State Failed To Prove Beyond A Reasonable Doubt That Mr. Welch Caused The Victim's Death During The Commission Of A Sexual Assault.

In an effort to have this Court uphold Mr. Welch's conviction for felony murder, the State argues alternative theories of guilt, none of which are sufficient to convince a rational trier of fact beyond a reasonable doubt. First, the State asserts that the combined testimony of Larry Bowles and Dr. Mullen was sufficient evidence for the jury to find beyond a reasonable doubt "that Ms. Smith died from asphyxiation due to Welch placing his hand over her nose and mouth." State's Brief 12. Mr. Welch disagrees. The State's evidence did not demonstrate when this act occurred and particularly that it occurred during a sexual assault, the State's burden of proof for felony murder. It could have occurred hours after the sexual assault. Only if you

speculate and engage in guesswork as to when it occurred can you conclude it happened during a sexual assault. Mr. Welch's conviction for felony murder cannot be upheld on such gross speculation.

If that theory is insufficient to convict, the State offers another. The State submits that “[b]ased on the video evidence and Dr. Mullen’s testimony, the jury could have also inferred beyond a reasonable doubt that sometime after the last video footage was taken, Welch inserted enough material in Smith’s mouth while she was sedated to result in her death from asphyxiation.” State’s Brief 12. Again, the State asks this Court to find sufficient evidence for conviction based on speculation and assumption. The State asks this Court to assume Mr. Welch put material in the victim’s mouth, sometime after the video footage shown the jury, without actual proof he did so. The prosecutor even conceded in closing argument that the victim was breathing at the end of the relevant video and stated, “[w]e don’t know exactly what happened after that.” (4/15/10 Tr. 147). The Court should reject the State’s request to affirm Mr. Welch’s felony murder conviction based on assumption and speculation rather than actual proof Mr. Welch asphyxiated the victim during a sexual assault.

In addition, the State fails to address Mr. Welch’s argument, see Petition for Appeal 21-22, that Dr. Mullen’s opinion the victim died from asphyxiation due to a “possibly compromised or obstructed airway” (4/15/10 Tr. 21) was insufficient for the jury to find beyond a reasonable doubt that was the cause of death. As stated in Mr. Welch’s Petition for Appeal, at 22, “the law is clear that a mere possibility of causation is not sufficient to allow a reasonable jury to find causation.” Spencer v. McClure, 217 W.Va. 442, 447, 618 S.E.2d 451, 456 (2005) (quoting Tolley v. ACF Industries, Inc., 212 W.Va. 548, 558, 575 S.E.2d 158, 168 (2002)). See also other caselaw cited in Petition for Appeal, at 21-22, to the same effect.

The State further asks the Court to disregard Mr. Welch's legitimate challenge to Dr. Mullen's opinion the victim's death was not due to alcohol intoxication. (4/15/10 Tr. 18). The State essentially asks the Court to ignore evidence from its own witnesses that the victim was an alcoholic, "drank for days at a time," had a chronic alcohol liver disease, and was on depression, pain, and liver medication. (4/13/10 Tr. 150-51, 176; 4/15/10 Tr. 22). The State produced absolutely no evidence the victim's semi-conscious state was not self-induced by her voluntary consumption of alcohol.

Since the victim's blood alcohol content (BAC) was .55 at autopsy, there is a reasonable doubt the victim died from alcohol intoxication. Although Dr. Mullen opined the victim's high BAC was inaccurate because decomposition of the body produces alcohol and increases the BAC, there is substantial scientific and medical evidence that decomposition would only contribute 10 to 20% of the BAC at autopsy. See leading forensic pathology treatise and caselaw cited in Petition for Appeal, at 19-20, indicating how much of the postmortem BAC could be attributed to decomposition. That State, of course, requests the Court to disregard this scientific evidence which is supported by caselaw. State's Brief 13. The Court should reject the State's invitation to blindly accept Dr. Mullen's testimony the victim did not die from alcohol poisoning when substantial authority indicates otherwise. It is significant the State did not address the caselaw Mr. Welch cited indicating that no more than .20% of BAC could be attributed to alcohol due to decomposition. See Petition for Appeal 20.

Finally, the State argues it presented sufficient evidence the victim died "as a result of injuries received during the commission of a sexual assault." State's Brief 15. The State's evidence, however, does not establish that. As demonstrated above, and in the Petition for Appeal, Dr. Mullen's testimony, as well as Mr. Bowles' testimony, are insufficient to show the

victim died during the commission of or as a result of a sexual assault. Even assuming, *arguendo*, the victim may have died from asphyxiation, there is no evidence it occurred during a sexual assault or as a result of injuries received during a sexual assault. The State's argument that asphyxiation could have occurred, as Mr. Bowles testified, when Mr. Welch put his hand over the victim's nose and mouth, proves this point. Assuming that is how the victim succumbed, there is no evidence it occurred during a sexual assault or as a result of injuries resulting from a sexual assault. It is just as reasonable to assume it happened several hours later and completely independent of the sexual assault.

The State's reliance on State ex rel. Bowers v. McBride, No. 101458 (W.Va. Supreme Court, February 25, 2011) (Memorandum Decision), is therefore misplaced as the State failed to establish a causal connection between the sexual assault and the victim's death by asphyxiation, even assuming Dr. Mullen's opinion as to the cause of death is correct.

The State's inability to prove the victim's cause of death is obviously the principal reason the prosecutor twice offered to drop the felony murder charge in exchange for Mr. Welch's guilty plea to sexual assaults. See first assignment of error.

III. The Erroneous Admission Of Evidence Mr. Welch Had Been To Prison Before, Combined With The Trial Court's Failure To Instruct The Jury To Disregard This Evidence, Was Plain Error.

The State does not dispute or disagree with the caselaw Mr. Welch cites indicating that the erroneous admission of collateral crime evidence is very prejudicial and is generally held to be reversible error. See State v. Dolin, 176 W.Va. 688, 692, 347 S.E.2d 208, 212-13 (1986), *overruled on other grounds*, State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990); State v. McGinnis, 193 W.Va. 147, 153, 455 S.E.2d 516, 522 (1994), and other cases cited in Petition for Appeal 25-26. Instead, the State argues Mr. Welch's substantial rights were not

affected by the erroneous admission of evidence he had been to prison before. State's Brief 16. The above caselaw refutes the State's argument this evidence was not prejudicial. Jurors understand that most defendants sent to prison have committed serious felonies. Also, the fact the prosecutor did not intentionally elicit this evidence from the witness does not change its impact on the jury and the likelihood the jury considered it in its deliberations.

In response to Mr. Welch's argument the trial court's failure to instruct the jury to disregard this evidence was plain error, the State contends such an instruction would have done more harm than good by drawing more attention to Mr. Welch's prior criminal history. State's Brief 16-17. The State's argument is valid only if one assumes jurors do not listen and follow the court's jury instructions. Moreover, the prejudice to Mr. Welch by the jury hearing he had a prior criminal history that sent him to prison was already done. Only by instructing the jury they could not consider such evidence could the court possibly undo the harm and eliminate it from their deliberations. The trial court's failure to do so gave the jury a green light to consider this inadmissible, prejudicial evidence.

The State's argument is further refuted by this Court's caselaw, which the State fails to acknowledge. This Court has found that similar prejudicial, collateral crime evidence did not have a prejudicial impact on the jury where the evidence of guilt was substantial and the jury was instructed to disregard it. See, e.g., State v. White, 223 W.Va. 527, 532, 535, 678 S.E.2d 33, 38, 41 (2009), and other cases cited in Petition for Appeal 28-30. It necessarily follows that where the evidence of guilt is very weak and circumstantial, as in this case pertaining to the felony murder count, "there is an increased probability" the erroneous admission of collateral crime evidence "will be deemed prejudicial." State v. Atkins, 163 W.Va. 502, 515, 261 S.E.2d 55, 63 (1979). That is why it was even more necessary for the trial court in this case to instruct the jury

to disregard this evidence. Otherwise, the jury very likely considered it in deciding both guilt or innocence of felony murder and the issue of mercy.

CONCLUSION

For the above reasons, David Welch respectfully requests that his convictions and sentences be reversed and his case remanded to the trial court so that the initial plea agreement rejected by the trial court may be considered by another judge. Alternatively, Mr. Welch requests that his conviction and sentence for felony murder be reversed and a judgment of acquittal be entered, or that he be granted a new trial on that charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on this 30 day of June, 2011, a copy of the foregoing Petitioner's Reply Brief was sent via U.S. Postal Service to Carl L. Harris, Prosecuting Attorney, 108 E. Maple Ave., Fayetteville, WV 25840.


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