



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,  
Plaintiff Below, Respondent

vs.

No. 11-1675

WILLIAM B.,  
Defendant Below, Petitioner

## PETITIONER'S CORRECTED BRIEF

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## ASSIGNMENTS OF ERROR

1. The lower court erred in failing to suppress William B.'s statement on the ground that police obtained it in violation of Art. III, §14 of the West Virginia constitution, providing the right to counsel, because police initiated contact with him after he had requested the appointment of counsel during his initial appearance before a magistrate after a criminal complaint was filed and he had been arrested and obtained an ostensible waiver of counsel before interrogating him about the charges for which he had been arrested.

2. The lower court erred in finding that William B.'s ostensible waiver of counsel, assuming police were permitted to initiate contact with him to obtain it, was voluntary, when the record contained evidence of multiple factors suggesting involuntariness and the court failed to make required findings of fact.

## STATEMENT OF THE CASE

This is a criminal prosecution for sexual offenses against a female child. Police filed a criminal complaint against petitioner William B. on December 14, 2010, charging him with committing four sexual offenses on or about February 1, 2008. William B. was arrested and lodged in the Northern Regional Jail & Correctional Facility. On the morning of December 17, 2010, a Marshall County magistrate conducted by closed circuit videoconferencing his initial appearance. During that appearance, William B. requested in writing that counsel be appointed for him. No more than an hour and a half after his initial appearance, and before counsel was actually appointed, police summoned William B. to an interview room in the Northern Regional Jail. After obtaining an ostensible written waiver of *Miranda* rights from William B., who has an I.Q. of 68, police interrogated him about the charges for which he had been arrested. William B. made admissions that arguably were inculpatory during the hour-long interrogation, namely that he had inserted his finger into the child's vagina at the request of his wife to see if the child was all right at the same time that his wife was engaging in sexual activity with him. The Marshall County grand jury indicted him. The State moved for a voluntariness hearing concerning the statement. William B. moved to suppress his statement on the grounds that it was involuntary in fact and had been obtained in violation of his rights to counsel protected independently by the Sixth and Fourteenth Amendments to the U. S. constitution and by Art. III, §14 of the West Virginia constitution. After an evidentiary hearing, the lower court denied his

motion to suppress. In the order denying the motion, the lower court ignored his claim concerning Art. III, §14 of the West Virginia constitution. App. pp. 185-186. William B. then entered a conditional plea of guilty under R. Crim. P. 11(a)(2) to the charge of sexual abuse by a custodian, reserving in writing the right to appeal the lower court's denial of his suppression motion. The lower court sentenced him to ten-to-twenty years imprisonment. App. pp. 187-233. This appeal follows that sentencing order.

The lower court made no specific findings of fact in denying the suppression motion, but the record will support the following findings. Detective Zachary Allman of the Marshall County Sheriff's Department filed a criminal complaint against William B. on December 14, 2010, charging him with sexual assault in the first degree, sexual abuse in the first degree, sexual abuse by custodian, and permitting sexual abuse by custodian. All were alleged to have been committed on or about February 1, 2008, against one S. J. H., who was born May 6, 2005. Defendant's Exhibit 1, App. p. 144. William B. was arrested and lodged in the Northern Regional Jail & Correctional Facility. His wife and co-defendant, C. H. B., was also arrested and lodged in the NRJ. Allman Testimony, App. p. 75. Magistrate David Buzzard of the Marshall County Magistrate Court conducted William B.'s initial appearance on December 17, 2010. He did so by videoconferencing. He sat in the magistrate court offices and William B. remained in the NRJ and appeared by television. App. p. 89. Magistrate Buzzard and William B. completed the "Initial Appearance: Rights Statement" form using facsimile

transmission. The magistrate faxed the form to William B. at the NRJ for his execution. William B. marked the form and faxed it back to the magistrate. The form shows receipt at the NRJ at 10:44 a.m. and receipt at the magistrate court at 11.21 a.m. on December 17<sup>th</sup>. App. p. 90. The "Rights Statement" shows that the magistrate advised William B. of his right to counsel. Defendant's Exhibit 2, App. p. 150. The Statement contains William B.'s personal written request that counsel be appointed for him. App. p. 150. Within an hour and a half after William B.'s initial appearance, Marshall County sheriff's deputies, Detectives Allman, Taylor, and Lockhart, had William B. and his wife, C. H.-B., summoned and placed in separate interview rooms at the NRJ. Lockhart Testimony, App. pp. 46-47. All three deputies interrogated C. H.-B. together. After ten or fifteen minutes, however, Detective Lockhart left her interrogation room because she was "not giving up any information." He went to interrogate William B.. He began the interrogation at 1:00 p.m. Lockhart Testimony, App. pp. 46-47. Lockhart testified that he read a legal-page length statement of rights to William B. in its entirety and that William B. signed it next to the statement "I understand my rights." William B. also signed under a "waiver of rights" provision that included the language: "I am willing to make a statement and to answer questions before being taken to a magistrate. I do not want a lawyer at this time." Lockhart Testimony, App. pp. 50-51. Lockhart testified that he interrogated William B. alone for about half an hour. He had no recording equipment. App. p. 53. Detective Allman, however, then joined Lockhart. Allman had recording equipment, and recorded the remainder of the interrogation.

App. p. 54. It ended about 2:00 p.m. App. p. 67. William B. said things during the interrogation, unrecorded and recorded, that the State considers to be confessional in nature or at least incriminating admissions concerning the sexual assault and abuse charges for which William B. was under arrest and about which he was interrogated. Lockhart Testimony, App. p. 56. Lockhart acknowledged that he informed William B. during the interrogation that William B.'s wife, who was being interrogated next door, had incriminated him. Lockhart acknowledged that this was false. Lockhart Testimony, App. p. 69. William B.'s emotional state and the nature of the police questioning of him appear in the recorded portion of the interrogation now in evidence. State Exhibit 2(A), App. p. 108. A psychologist evaluated William B. in March 2010 and determined through testing that he has a full scale IQ of 68, in the extremely low range. Defendant's Exhibit 3, App. p. 155.

## SUMMARY OF ARGUMENT

The lower court erred in ignoring William B.'s argument that his statement should be suppressed because police violated Art. III, §14 of the West Virginia constitution, which, William B. submits, protects the right to counsel of a charged criminal defendant who has requested the appointment of counsel at the initial appearance, independently of any Sixth Amendment jurisprudence, by prohibiting police from initiating contact with the defendant for the purpose of obtaining a waiver of the right to counsel.

But even if in light of the recent U.S. Supreme Court decision changing the law under the Sixth Amendment to permit police to make initial contact with such a defendant, and even if that principal now applies under Art. III, §14 of the West Virginia constitution, the State failed to sustain its burden of proving by a preponderance of the evidence that William B.'s ostensible waiver was knowing, voluntary, and intelligent. The lower court failed to make findings of fact as required on the issue. The record, however, will permit this Court to make that determination. If it does not, then the matter should be remanded to the lower court for a new hearing.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner William B. submits that a Rule 20 oral argument is necessary because the case involves a constitutional question of public importance that is an issue of first impression in this Court.

## ARGUMENT

THE LOWER COURT SHOULD HAVE SUPPRESSED WILLIAM B.'S STATEMENT BECAUSE POLICE OBTAINED IT IN VIOLATION OF THE RIGHT TO COUNSEL SECURED BY ART. III, §14 OF THE WEST VIRGINIA CONSTITUTION.

West Virginia case law concerning limits on police interrogation of a criminal defendant after his right to counsel has attached has generally been couched in terms of the Sixth Amendment to the United States constitution. *See e.g. State v. Barrow*, 178 W. Va. 406, 359 S.E.2d 844 (1987); *State v. Crouch*, 178 W. Va. 221, 358 S.E.2d 782 (1987); *State v. Wyer*, 193 W. Va. 720, 320 S.E.2d 92 (1984). But the West Virginia constitution provides a similar guarantee to the right to counsel:

. . . In all such trials, the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defense .  
...

W. Va. Const. Art. III, §14 (elided in part). This Court has held that under this provision:

There can be no interrogation of a person accused of committing a crime after he requests counsel, until counsel is provided except that if the suspect recants his request before counsel can be provided with reasonable dispatch, interrogation may be conducted.

Syllabus Point 3, *State v. Bradley*, 163 W. Va. 148, 255 S.E.2d 356 (1979). William B. moved to suppress his statement on the ground that police obtained it in

violation of Art. III, §14 because they initiated the contact with him resulting in his ostensible waiver of the right to counsel shortly after he had requested the appointment of counsel at his initial appearance before a magistrate. Motion to Suppress, App. pp. 6-7, ¶¶ 2, 4. He argued the point orally at the end of the suppression hearing. App. p. 100. And he argued it in his memorandum of law filed with the court. App. pp. 175-176. The lower court, however, failed to address the point in its order denying his suppression motion. The court found only that his Fifth and Sixth Amendment rights were not violated. App. pp. 185-186. The standard for review of whether a statement or confession should be suppressed is that legal conclusions with regard to whether the statement or confession should be suppressed are reviewed de novo and factual determinations upon which those legal conclusions are based are reviewed under the clearly erroneous standard. Syl. Pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994); Syl. Pt. 2, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994). The lower court made no factual determinations concerning the applicability of Art. III, §14. The facts relevant to William B.'s claim, however, appear clearly in the record and are undisputed. After his arrest, he requested that counsel be appointed for him at his initial appearance. Magistrate Buzzard Testimony, App. pp. 90-91; Defendant's Ex. 2, App. p. 151. And less than an hour and a half after that appearance, police initiated contact with William B. to interrogate him. Detective Lockhart Testimony, App. p. 61. The record is therefore sufficient to permit this Court to determine that William B.'s statement should have been suppressed pursuant to the requirements of Art. III, §14. The

Court in *Bradley*, which reversed a murder conviction because authorities obtained statements from the defendant despite his multiple requests for counsel, made it clear that the right to counsel protected by that provision of our state constitution does not depend on the content of federal case law:

When a criminal defendant requests counsel, it is the duty of those in whose custody he is, or if he is not in custody and is indigent, the duty of those to whom the request is made, to secure counsel for the accused within a reasonable time. In the interim, no interrogation shall be conducted, under any guise or by any artifice.

\* \* \* \*

. . . . [I]t may be well that we emphasize that our own state constitutional guarantees, W. VA. CONST. Art. 3, §5 (protection against self-incrimination) and Art. 3, §14 (assistance of counsel guarantee) demand the conclusions we reach; and that our reference to the federal cases, of which *Miranda* is surely the most soundly reasoned and perceptive, is to reflect the guidance they give, and is not to incorporate the federal constitution's protections as bases for our rule.

163 W. Va. at 152-153, 255 S.E.2d at 358-359. William B. submits that Art. III, §14 protects a criminal defendant's right to counsel by the same means required in the now-overruled case of *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986): by prohibiting police initiation of contact with an arrested defendant who has been formally charged with crime and who has requested the appointment of counsel at arraignment. This is suggested by *Bradley*, which of course pre-dates *Jackson*. And such protection is more consistent with the significance accorded the right to counsel under West Virginia law than it is with the apparent perception of a diminished significance of the Sixth Amendment right to counsel exhibited in

*Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009).

*Montejo* held that police can initiate contact with a criminal defendant who has requested counsel and obtain a valid waiver of the right to counsel under the Sixth Amendment. But the *Montejo* court noted that the old rule prohibiting police from initiating interrogation after the defendant has requested the appointment of counsel “[w]ould apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made. . . .” 556 U.S. at 783, 129 S. Ct. at 2083, 173 L. Ed. 2d at . And it also observed that “[i]f a State wishes to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so.” 556 U.S. at 793, 129 S. Ct. at 2089, 173 L. Ed. 2d . Both observations, William B. submits, apply in West Virginia under Art. III, §14 of its constitution, should continue to apply, and should be applied in this case. The rule prohibiting police initiated interrogations is consistent with West Virginia provisions for appointment of counsel for indigent criminal defendants and will tend to prevent unseemly police interference in that process. The rule will be a simple one, obviating the need for hearings such as the one in this case with their unfortunate evidentiary pressures. And, contrary to the view of the *Montejo* court, prohibiting police from initiating contact with a charged criminal defendant who has requested counsel will not result in the unjustified loss of opportunity for police to obtain evidence of crime. After all, if William B. had been as cooperative as police portrayed him in testimony, they could have successfully interrogated him before lodging him in jail. This Court should, William

B. submits, determine that Art. III, §14 of the West Virginia constitution, independent of federal case law, continues to prohibit police from initiating contact for the purpose of conducting an interrogation in the absence of counsel with a defendant in William B.'s position who has requested the appointment of counsel. This Court should determine that the police initiated such contact in this case. And this Court should determine that the lower court erred in failing to suppress William B.'s statement under Art. III, §14.

William B. argues next that even if the police were permitted under Art. III, §14 to initiate contact with him in the circumstances and obtain a valid waiver of his right to counsel before interrogating him, the record contains sufficient evidence to support a finding that his ostensible waiver of the right to counsel was involuntary in fact. The lower court, however, made no findings of fact. This Court should therefore determine that the State failed to meet its burden of proof on the issue of voluntariness and accordingly reverse the denial of William B.'s motion to suppress. Alternatively, the Court might remand the issue to the lower court for findings of fact.

WILLIAM B.'S STATEMENT SHOULD BE SUPPRESSED BECAUSE THE STATE FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT OR ART. III, §14 OF THE WEST VIRGINIA CONSTITUTION.

Assuming that the police properly initiated contact with William B. to obtain a waiver of counsel and to interrogate him in the absence of counsel, this Court should nevertheless reverse the lower court's denial of William B.'s motion to suppress, because the State failed to meet its burden of proof that his ostensible waiver of counsel was knowing, voluntary, and intelligent. William B. raised this issue in his motion to suppress. Motion to Suppress, App. p. 7, ¶¶ 3, 4, 6. He also raised it in his memorandum of law filed with the lower court in support of his motion to suppress. Memorandum, App. p. 174. Whether a defendant has knowingly, voluntarily, and intelligently waived a constitutional right is a legal question in which appellate review of the trial court's ultimate determination is plenary and de novo. Syl. Pt. 1, *State v. Redden*, 199 W. Va. 660, 487 S.E.2d 318 (1997). This Court will review underlying findings of fact under a "clearly erroneous" standard. *Id.* But where the lower court has failed to make specific factual findings as required in support of its ultimate legal conclusion of voluntariness, it may be necessary to remand for a new hearing. *State v. Farley*, 192 W. Va. 247, 253-254, 452 S.E. 2d 50, 57-58 (1994). Here the lower court made no specific findings of fact, but held that William B. did, in the totality of the circumstances, willingly, knowingly, and intelligently waive his right to counsel

during the custodial interrogation. Hence, the court found, neither William B.'s Fifth nor Sixth Amendment rights to counsel was violated. But the record contains evidence supporting findings that circumstances existed that either alone or in combination tend to militate against a finding that William B.'s waiver was voluntary. First, notwithstanding the testimony of Detective Lockhart that William B. was cooperative, very willing to speak with Lockhart, and very comfortable doing so, App. pp. 56-58, the actual recording of the interrogation presents a substantially different picture. App. p. 108. William B. was distraught and unwilling to talk to his interrogator, who pressured him with a raised voice. *Id.* Detective Lockhart falsely told William B. that his wife had just incriminated him. Lockhart Testimony, App. p. 69. This falsehood generated an immediate, strong response from William B.. Lockhart Testimony, App. p. 59; CD-R, App. p. 108. William B. could not read very well. Lockhart Testimony, App. p. 50. He had an I.Q. of 68, in the very low range. Defendant's Exhibit 3, App. p. 154. No one mentioned that William B. had just appeared before a magistrate and requested the appointment of counsel. And the *Miranda* rights form read to William B. by Lockhart and signed by William B. advised him he was waiving his rights before being taken before a magistrate. State Exhibit 1, App. p. 143. The effect of the latter two circumstances was obviously to diminish, if not eliminate, from William B.'s understanding the confusing fact that he had just requested counsel. There are therefore at least six factors appearing in the evidence that tended to render William B.'s ostensible waiver of his right to counsel involuntary. He submits that the lower court was required to make findings

of fact addressing them. R. Crim. P. 12(e). But the lower court did not. William B. submits that this Court can determine from the record that the State failed to meet its burden of proving by a preponderance of the evidence that his waiver was voluntary, that is, that a reasonable review of the evidence clearly fails to support voluntariness. *Farley, supra*, 192 W. Va. at 254, 452 S.E.2d at 57. But should this Court decline to reverse the denial of William B.'s motion to suppress, the case should be remanded for a new hearing on the issue of the voluntariness of his ostensible waiver of his right to counsel and the required essential findings of fact.

## CONCLUSION

For the foregoing reasons, the lower court's denial of William B.'s motion to suppress should be reversed on the ground that police initiation of contact with him after he had requested counsel to obtain a waiver of the right to counsel preliminary to interrogation without counsel violated Art. III, §14 of the West Virginia constitution. Even if police initiation of contact was appropriate, the denial should nevertheless be reversed because the State failed to meet its burden of proof that the waiver was knowing, voluntary, and intelligent. Finally, this Court might remand the matter to the lower court for a new hearing and findings of fact concerning whether the ostensible waiver was knowing, voluntary, and intelligent.

CERTIFICATE OF SERVICE

I certify that the foregoing petitioner's corrected brief was served upon the West Virginia Attorney General by mailing a copy by first-class U.S. mail, postage pre-paid, addressed:

West Virginia Attorney General  
Attention: Laura Young  
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this 26<sup>th</sup> day of February 2013.

  
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