



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1675

STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

WILLIAM B.,

*Defendant Below,  
Petitioner.*

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RESPONDENT'S CORRECTED BRIEF

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I.

STATEMENT OF THE CASE

The Petitioner, William B., was taken into police custody pursuant to an arrest warrant for a string of sexual crimes he committed against his step-daughter, S.H. (App. at 177.) The Petitioner was arraigned before Magistrate David Buzzard, by video conference from the Northern Regional Jail on the morning of December 17, 2010. (*Id.*) During his arraignment, the Petitioner was required to complete a form entitled "Initial Appearance: Rights Statements." (*Id.* at 150-51;177.) The form advised the Petitioner that he had a right to be represented by counsel and the Petitioner indicated on the form that he would like an attorney appointed to represent him. (*Id.* at 150;178.) The same document stated that "The magistrate has informed me that I do not have to make any statement to

anyone other than the statements in this document and that any statement I do make may be used against me.” (*Id.* at 151;178.)

Several hours after he was arraigned, the Petitioner was interviewed by detectives from the Marshall County Sheriff’s Department at the Northern Regional Jail. (*Id.* at 108; 178.) The Petitioner was advised of his Miranda rights and thereafter signed a “Waiver of Rights” in which he indicated that he understood those rights, agreed to waive those rights and affirmatively indicated that he did not want an attorney present. (*Id.* at 143;178). The Petitioner was interviewed for approximately one hour, during which time he confessed to committing the sexual crimes against S.H. (*Id.* at 108; 179.)

During the interview, the Petitioner stated that he had given S.H. a bath and dressed her in a sleeper following the bath. (*Id.* at 129-30.) However, S.H. soon spilled her sippy cup and the Petitioner removed her soiled clothes to get her clean ones. (*Id.* at 130.) The Petitioner then told officers that his wife removed S.H.’s diaper. (*Id.* at 131.) Thereafter, the Petitioner confessed that he digitally penetrated his three-year-old step-daughter while his wife, the girl’s mother, stroked his penis. (*Id.* at 115-19; 121-22.) While his wife manually stimulated him, S.H.’s head rested in between the Petitioner’s legs, with his penis resting on her back. (App. at 121; 131-32.) After an unknown length of time, S.H got up from the bed and walked to the kitchen, asking that the Petitioner pour milk in her sippy cup. (*Id.* at 125.)

During the interview with police, the Petitioner also stated that he told S.H., “You stay right there because Mommy wants me to do something.” (*Id.* at 126-27.) According to the Petitioner, he and his wife had sexual intercourse and he then ejaculated “real quick” with S.H. out of the room. (*Id.* at 127.)

The Petitioner was indicted on July 19, 2011, for one count of sexual abuse by a custodian, parent or person in a position of trust, one count of incest, one count of first degree sexual assault and one count of display to a minor of obscene matter for offenses against his step-daughter, S.H. (*Id.* at 1-4.) Following the grand jury indictment, the State filed a “Motion to Schedule a Hearing for the Voluntariness of the Confession of the Defendant, William B.” on July 20, 2011. (*Id.* at 5.) In response, Petitioner’s counsel filed “Defendant’s Motion to Suppress his December 17, 2010 Statement to Police. (*Id.* at 6-7.)

Thereafter, a pre-trial hearing was held on October 17, 2011. (*Id.* at 9.) At the hearing, the court addressed the voluntariness of the Petitioner’s statement. (*Id.* at 41.) The State called Detective Ross Lockhart, who testified that the Petitioner agreed to talk with him after signing a Miranda Warning Form. (*Id.* at 48.) Detective Lockhart testified that the form was one usually utilized by detectives and addressed basic information, as well as the Petitioner’s Miranda Rights. (*Id.*) Detective Lockhart testified that he read the Miranda Warning Form to the Petitioner to make sure that the Petitioner was aware of what he was being read. (*Id.* at 50.) The Petitioner signed the document several times, indicating that he understood what his rights were and that he waived his right to have counsel present during questioning. (*Id.* at 51;143.)

Detective Lockhart testified that he initiated the interview but the Petitioner showed no hesitation in speaking with law enforcement. (*Id.* at 58; 61.) Detective Lockhart was asked to read through a transcript of an audio-taped recording of the interview with the Petitioner and indicated, when asked, that it was a true and accurate reflection of the conversation. (*Id.* at 54.) Thereafter, the recording, as well as the transcript, were admitted into evidence without objection. (*Id.* at 54-56.) Following Detective Lockhart’s testimony and cross-examination, the court indicated that it was

simultaneously considering “Plaintiff’s Motion to Schedule a Hearing for a Voluntariness of the Confession of the Defendant William B.” and “Defendant’s Motion to Suppress a December 17th, 2010 Statement to Police.” (*Id.* at 72-73.)

Detective Zackary Allman also testified at the pre-trial hearing. (*Id.* at 73.) Detective Allman testified that he interviewed both the Petitioner and his wife at the Northern Regional Jail regarding sexual allegations against victim, S.H. (*Id.* at 74-75.) Detective Allman also testified that he had reviewed the interview transcript and that it truly and accurately reflected the conversation that he had with the Petitioner. (*Id.* at 76-77.) Detective Allman testified that the Petitioner never asked to end the conversation, never asked to leave the room, never asked to go to the bathroom or needed a drink. (*Id.* at 77.) Detective Allman also testified that the Petitioner never advised him that he wanted to speak to an attorney. (*Id.* at 78.)

Magistrate David Buzzard appeared as a third witness at the pre-trial hearing. (*Id.* at 84.) Magistrate Buzzard testified that he signed and approved the criminal complaint filed against the Petitioner. (*Id.* at 85.) Magistrate Buzzard also reviewed the Petitioner’s Initial Appearance Rights Statement and testified that the Petitioner had been advised of his charges, his right to attorney and his right to a preliminary hearing. (*Id.* at 86.) Magistrate Buzzard testified that the Petitioner indicated on the form that he wanted an attorney appointed to represent his interests (*id.* at 90) and that he wanted a preliminary hearing. (*Id.* at 92.)

Following the testimony and cross-examination of Magistrate Buzzard, the court requested that both parties file briefs on the motions. (*Id.* at 100.) On October 25, 2011, the Petitioner filed “Defendant’s Memorandum of Law in Support of his Motion to Suppress his December 17, 2010 Statement to Police.” (*Id.* at 169-76.) On the same day, the State filed the “State’s Memorandum

in Opposition to Defendant's Motion to Suppress." (*Id.* at 177-84.) Thereafter, on October 26, 2011, the court issued an order denying the motion to suppress. (*Id.* at 185-86.) The court found that:

In support of the Court's determination as set forth in this order, it applies *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079 (2009) and finds that Mr. [B]'s Sixth Amendment right to counsel was not violated.

Furthermore, on December 17, 2010, Mr. [B.], prior to making the subject statement(s) to law enforcement, did (in the totality of the circumstances) willingly, knowingly, and intelligently waive his right to be represented by counsel during the custodial interrogation. Accordingly, neither Mr. [B.]'s Fifth nor his Sixth Amendment right to counsel were violated.

Accordingly, the December 17, 2010, statement provided to law enforcement by Mr. [B.] is deemed admissible at the Trial of this case.

(App. at 185-86.)

Following the circuit court's denial of his pre-trial motion to suppress, the Petitioner entered a plea agreement on October 31, 2011. (App. at 187-92.) As part of the plea agreement, the Petitioner entered a *Kennedy v. Frazier* guilty plea to the charge of sexual abuse by a parent, guardian, custodian or person in a position of trust as charged in Count I of the indictment. (*Id.* at 187-88.) As part of the agreement, the Petitioner was sentenced to not less than ten (10) nor more than twenty (20) years. (*Id.* at 188.)

Under the agreement, the State agreed to move to dismiss Count II and Count IV of the indictment with prejudice. (*Id.* at 189.) The State also agreed to move to dismiss Count III of the indictment without prejudice. (*Id.*) The Petitioner reserved his right to appeal the court's denial of his motion to suppress and the State reserved the right to reinstitute charges on Count III of the indictment if the Petitioner successfully appealed. (*Id.* at 188-89.) Under the plea agreement, the

Petitioner was also required to register as a sex offender for life and serve a period of supervised release following his release from prison. (*Id.* at 189-190). The Petitioner agreed to not file “any pleadings which would delay, reduce, or modify his sentence, or execution thereof, including, but not limited to, a Rule 35 Motion for Modification of Sentence, or the preparation and filing of a Pre-Sentence Investigation Report.” (App. at 190.)

On October 31, 2011, the same day the plea agreement was entered, the Petitioner filed “Defendant’s Reservation of Right on Appeal Following his Guilty Plea to Review of the Adverse Determinations of his Motion to Suppress his December 17, 2010, Statement to Police and the State’s Motion to Determine the Voluntariness of the Statement.” (*Id.* at 193.) The Petitioner’s appeal follows the entry of his sentencing order on November 2, 2011. (*Id.* at 221-33.)

## II.

### SUMMARY OF ARGUMENT

The Petitioner raises two arguments on appeal. The Petitioner argues that the circuit court erred in denying the Petitioner’s pre-trial motion to suppress his December 17, 2010 statement. Second, the Petitioner argues that the circuit court erred in finding that the Petitioner’s waiver of counsel was voluntarily entered. For reasons that will be addressed in the argument subsection below, the Petitioner’s arguments cannot stand. The circuit court applied the correct standard under *Montejo v. Louisiana*, 556 U.S. 778 (2009) and did not err in denying the Petitioner’s pre-trial motion to suppress. The circuit court also correctly found that “on December 17, 2010, Mr. B., prior to making the subject statement(s) to law enforcement, did (in the totality of the circumstances) willingly, knowingly, and intelligently waive his right to be represented by counsel during the

custodial interrogation. Accordingly, neither Mr. B.'s Fifth nor his Sixth Amendment right to counsel were violated." (App. at 185-86.)

### III.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under W. Va. Rev. R.A.P. 18(a) is not necessary because the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument.

### IV.

#### ARGUMENT

**A. The circuit court did not err in denying the Petitioner's pre-trial motion to suppress his December 17, 2010 statement.**

The Petitioner argues that the circuit court should have suppressed the Petitioner's December 17, 2010 statement because it was obtained in violation of the Petitioner's right to counsel under Article III, Section 14 of the West Virginia Constitution. The Petitioner argues that the circuit court did not address his argument under Article III of the West Virginia Constitution and instead addressed it only on Fifth and Sixth Amendment grounds. Nonetheless, the Petitioner's argument still fails and the circuit court did not err in denying the Petitioner's pre-trial motion to suppress his December 17, 2010 statement.

In Syl. Pt. 3 of *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994), this Court held that:

On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

The Petitioner argues that Article III, Section 14 of the West Virginia Constitution “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.” (Pet’r’s Br. at 10.) The Petitioner argues that although *Montejo* narrows a defendant’s Sixth Amendment right to counsel in respect to police interrogation, that a defendant’s state constitutional right to counsel under Article III, Section 14 is not similarly narrowed by the holding of *Montejo*. The Petitioner’s argument lacks sufficient support.

The Petitioner’s only support in state law rests strictly on the overruled Supreme Court decision of *Michigan v. Jackson*, 475 U.S. 625 (1986). In support of his argument, the Petitioner instead cherry-picks to provide highly selective tidbits from the Supreme Court’s holding in *Montejo*. First, the Petitioner provides a quote from *Montejo* reasoning that the rule adopted by the Louisiana Supreme Court, and expressly rejected by the United States Supreme Court “would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made, which usually occurs after the court has informed him that he will receive counsel if he asks for it.” *Montejo v. Louisiana*, 556 U.S. at 783 (2009). Second, the Petitioner provides a quote from *Montejo* stating that, “If a State *wishes* to abstain from requesting interview with represented defendants when counsel is not present, it obviously may continue to do so.” *Id.* at 793. The Petitioner therefore argues that both of these statements “apply in West Virginia under Article III, Section 14 of its Constitution, should continue to apply, and should be applied in this case.” (Pet’r’s Br. at 11.) The Petitioner asserts that “[t]he Rule will be a simple one, obviating the

need for hearings such as the one in this case with their unfortunate evidentiary pressures.” (Pet’r’s Br. at 11.) The Petitioner’s argument fails.

Although the Petitioner finds minimal support for his arguments in *Montejo* in that West Virginia *may* abstain from requesting interviews from represented defendants when counsel is not present and that the harshly criticized rule utilized by the Louisiana state court would apply *well enough* in states such as West Virginia, who require an indigent defendant to request counsel rather than receiving the assistance of counsel automatically, the Petitioner’s argument, as a policy, simply cannot stand. *Montejo* 556 U.S. at 793. As the Supreme Court pointed out in *Montejo*:

Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but “badgering” by later requests is prohibited. If that regime suffices to protect the integrity of a “suspect’s voluntary choice not to speak outside his lawyer’s presence” before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached.

*Id.* at 794-95 quoting *Texas v. Cobb*, 532 U.S. 162, 175, 121 S.Ct. 1335, (2001) (Kennedy, J., concurring).

*Jackson* was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule. *Miranda* and the cases that elaborate upon it already guarantee not simply noncoercion in the traditional sense, but what Justice Harlan referred to as “voluntariness with a vengeance,” 384 U.S., at 505, 86 S.Ct. 1602 (dissenting opinion). There is no need to take *Jackson*’s further step of requiring voluntariness on stilts.

On the other side of the equation are the costs of adding the bright-line *Jackson* rule on top of *Edwards* and other extant protections. The principal cost of applying any exclusionary rule “is, of course, letting guilty and possibly dangerous criminals go free . . . .” *Herring v. United States*, 555 U.S. 135, \_\_\_, 129 S.Ct. 695, 701, 172 L.Ed.2d 496 (2009). *Jackson* not only “operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless,” *Cobb, supra*, at 174-175, 121 S.Ct.

1335 (KENNEDY, J., concurring), but also deters law enforcement officers from even trying to obtain voluntary confessions. The “ready ability to obtain uncoerced confessions is not an evil but an unmitigated good.” *McNeil*, 501 U.S., at 181, 111 S.Ct. 2204. Without these confessions, crimes go unsolved and criminals unpunished. These are not negligible costs, and in our view the *Jackson* Court gave them too short shrift.

(*Id.* at 795-96.)

The Petitioner’s argument boils down to the conclusion that the holding in *Jackson*, now overruled by *Montejo* should still extend to defendants under Article III, Section 14 of the West Virginia Constitution and deny police officers the ability to initiate an interrogation of a represented defendant, without opportunity for a valid waiver of the defendant’s right to counsel. As the *Montejo* court pointed out, the Petitioner’s argument is both dangerous and unnecessary and it should not be upheld, even on state constitutional grounds. As will be discussed more thoroughly in Section B of the Argument below, although the Petitioner requested counsel at his arraignment, he entered a knowing, intelligent and voluntary waiver of that right prior to his police interview in which he confessed his crimes. (App. at 143.) Applying the Supreme Court’s holding in *Jackson* on state law grounds would result in the suppression of a statement of a man who admittedly molested a three-year-old girl on predominately technical grounds.

The Petitioner’s constitutional rights were and are still properly protected under the *Miranda-Edwards-Minnick* line of cases. In order to stop the interview with police, the Petitioner needed only to request that police stop the interview and invoke his right to not speak outside of counsel’s presence. The Petitioner did not do so. Instead, he was thoroughly advised of his right to have counsel present and signed a waiver of his right. He was constantly informed that he did not have to confess to any crimes. (*Id.* at 143.)

The Petitioner's argument as to what this Court "may" or "could" adopt under state constitutional grounds simply does not hold water. As the Supreme Court held in *Montejo*, "when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not 'pay its way.'" *Montejo v. Louisiana*, 556 U.S. at 797 (2009) quoting *United States v. Leon*, 468 U.S. 897, 907-908, n.6, 104 S.Ct. 3405, 82 L.E.2d 677 (1984). The same holds true under the state constitution. When the marginal benefit of preventing police-initiated interrogation of a represented defendant outside of counsel's presence is weighed against the substantial cost of suppressing the voluntary guilty statement of an admitted toddler-molester, the rule simply does not "pay it's way." *Id.* Therefore, the State urges that this Court extend the holding of the Supreme Court in *Montejo* on state constitutional grounds. The Petitioner's argument lacks sufficient legal support and is theoretical at best. Therefore, the circuit court did not err in denying his pre-trial motion to suppress.

**B. The Petitioner's December 17, 2010 waiver of his right to counsel was knowing, intelligent and voluntary.**

The Petitioner contends that the circuit court should have suppressed the Petitioner's December 17, 2010, statement to police because the State "failed to meet its burden of proof that B.'s ostensible waiver of counsel was knowing, voluntary and intelligent." (Pet'r's Br. at 13.) The Petitioner argues that his December 17, 2010 statement to police was not voluntarily entered. The Petitioner argues that he was "distraught and unwilling to talk to his interrogator, who pressured him with a raised voice." (Pet'r's Br. at 14.) The Petitioner also argues that interviewing officer, Detective Lockhart "falsely told [B.] that his wife had just incriminated him" and "this falsehood generated an immediate, strong response from [B.]" (Pet'r's Br. at 14; *Id.* at 69.) Finally, the

Petitioner argues that his “very low” IQ of 68 and impaired reading ability affected the voluntariness of his confession. (Pet’r’s Br. at 14; App. at 154.)

In Syl. Pt. 1 of *State v. Redden*, 199 W. Va. 660, 487 S.E.2d 318 (1997), this Court held that:

A trial court's ultimate determination of the knowing, intelligent voluntariness of a criminal defendant's waiver of the constitutional right to a jury trial is upon review a legal question requiring independent appellate determination. In such a case, although appellate review of the trial court's ultimate determination is plenary and *de novo*, this court will review specific findings of fact by the trial court which underlie its determination under the deferential “clearly erroneous” standard.

In Syl.Pt. 1 of *State v. Farley*, 192 W. Va. 247, 452 S.E. 2d 50 (1994) this Court held that:

A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.

At the pre-trial hearing held on October 17, 2011, the circuit court heard testimony from interviewing detective, Detective Ross Lockhart, who testified that the Petitioner agreed to talk with him after signing a Miranda Warning Form. (App. at 48.) Interviewing detective, Detective Zackary Allman also testified at the pre-trial hearing. (*Id.* at 73.) Detective Allman testified that the Petitioner never asked to end the conversation, never asked to leave the room, never asked to go to the bathroom or needed a drink. (*Id.* at 77.) Detective Allman also testified that the Petitioner never advised him that he wanted to speak to an attorney. (*Id.* at 78.)

At the pre-trial hearing, when questioned, Detective Lockhart also testified that he read the Miranda Waiver form to the Petitioner:

Q: Now, on December 17, did you have occasion to read that document to Mr. [B.]?

A: Yes.

Q: Okay. You read him the sentences?

A: Yes, I did.

Q: Did you rely upon him to read the document himself?

A: I asked him if he could read, and he told me that he didn't read very well, and told him that I could read it for him if that would help him understand it.

Q: And did you read it for him?

A: I did.

Q: Okay. And there's a portion of that document at the bottom that is in brackets.

A: Yes.

Q: Can you tell the Court why that's in brackets?

A: Because when I was speaking to him, I told him, I said, "The first part that I've read to you is you -- our rights." Where I had him sign the first time, about three quarters of the way down the page, that was stating that he understood what his rights were, and I continued on the bracket portion, which is the Waiver of Rights. I read him his Waiver of Rights where he waived his right to have counsel present during questioning; asked him if he understood and asked him if he wanted to answer questions. He answered in the affirmative that he did. Therefore, I had him sign that.

I signed it as a witness, and I actually put the time, according to my watch, that I had read that portion to him and the date.

*(Id. at 50-51.)*

Following the pre-trial hearing and after briefs were filed by both parties, on October 26, 2011 the circuit court held that:

Furthermore, on December 17, 2010, Mr. [B.], prior to making the subject statement(s) to law enforcement, did (in the totality of the circumstances) willingly, knowingly, and intelligently waive his right to be represented by counsel during the custodial interrogation. Accordingly, neither Mr. [B.]'s Fifth nor his Sixth Amendment right to counsel were violated.

*(Id. at 186.)*

Even when the legal conclusion of voluntariness is considered *de novo*, the Petitioner's argument fails because the trial court's decision regarding the voluntariness of the Petitioner's confession was not plainly wrong or clearly against the weight of the evidence. *Farley, supra* at Syl. Pt. 1. The circuit court was presented with a great deal of testimony from two trained detectives, and a transcript of the interview with the Petitioner that indicated that his waiver of counsel was voluntarily entered. Although there were no findings of fact, it is clear that the circuit court considered a great deal of evidence in making the determination that the Petitioner's confession was voluntarily entered and that the Petitioner's Fifth and Sixth Amendment right to counsel were not violated. The circuit court's determination was not plainly wrong or clearly against the weight of the evidence and therefore cannot be overturned.

V.

### CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court dismiss the petition and deny any and all relief requested by the Petitioner.

Respectfully Submitted,

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*Respondent,*

By Counsel,

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**CERTIFICATE OF SERVICE**

I, Laura Young, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of the "*RESPONDENT'S CORRECTED BRIEF*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 12th day of February, 2013, addressed as follows:

To: John R. Anderson, Esq  
Public Defender Corp.  
2nd Judicial Circuit  
607 Court Ave.  
Moundsville, WV 26041

  
\_\_\_\_\_  
LAURA YOUNG