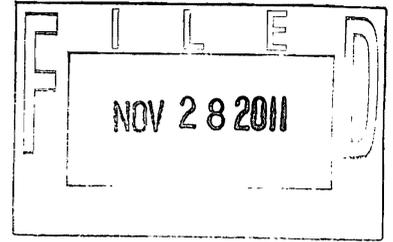


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 11-1273



STATE OF WEST VIRGINIA,
Plaintiff below, APPELLEE,

V.

APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF
NICHOLAS COUNTY (09-F-17)

RODNEY L. HYPES,
Defendant below, APPELLANT

Petitioner's Brief

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ASSIGNMENTS OF ERROR

I. The trial court abused its discretion when it erroneously admitted the statement made by Hypes two years after the events alleged in the indictment.

II. The trial court abused its discretion and made clearly erroneous findings of fact when it denied the motion of the defendant for a judgment of acquittal.

STATEMENT OF THE CASE

Rodney L. Hypes, born April 24, 1961, was indicted on March 18, 2009, by the Nicholas County grand jury. Count one of the indictment alleged that on a day in July, 2007, Hypes committed the offense of “operating or attempting to operate a clandestine drug laboratory”, in violation of West Virginia Code, Section 60A, Article 4, Section 411 (2003). Count two alleged that Hypes conspired with Tina M. Keener to manufacture methamphetamine, a

violation of West Virginia Code, Chapter 60A, Article 10, Section 31 and also Chapter 60A, Article 4, Section 401. Keener was named in the indictment but not indicted as a co defendant.

The trial was held on August 13, 2009. The Court dismissed Count two at the end of the State's evidence, but the jury returned a guilty verdict on Count one. Hypes was sentenced on October 19, 2009, to serve a sentence of two to ten years in prison for his conviction and was given credit for time served. The defendant was re sentenced to permit this appeal to be timely filed.

The evidence produced at trial was that on the evening of July 30, 2007, Gretchen Roop, the manager of the Dylan Heights Apartments in Summersville, Nicholas County, West Virginia, watched Rodney Hypes leave apartment 223 with a garbage bag that he carried "carefully" from the apartment to a dumpster in the parking lot. Hypes deposited the bag and left the area. Being

suspicious, Roop retrieved the bag of garbage from the dumpster and took it to the maintenance area where she looked inside the bag. She saw matchbooks and peroxide bottles, so she phoned her husband and Shane Dellinger who were serving as police officers at East Bank. In due course, Dellinger and Roop arrived and examined the bag. The local drug task force was called, including sergeant Tim Blake and Mike Hanks, a sheriff's deputy assigned to the task force. Blake and Hanks sifted through the garbage in the bag and found coffee filters, matchbooks, a bottle of HEET, empty blister packs, and a smoking bottle, together with mail addressed to Tina Keener at 223 Dylan Heights apartments.

Blake and Hanks went to door of apartment 223 but no one answered the door. The apartment was secured to prevent entry to it, and Blake left to make application for a search warrant. The Magistrate Court of Nicholas County authorized the search of 223

Dylan Heights Apartments and the search warrant was executed. Found during the search was a medical card belonging to Rodney Hypes; matchbooks; chemicals, including red phosphorus, iodine, acetone and hydrochloric acid; tubing; a propane canister; camp fuel; a hotplate and a publication entitled Uncle Fester's Cook Book. No identifiable controlled substance, including methamphetamine or its precursor drugs was found.

Rodney Hypes was a frequent visitor at 223 Dylan Heights because he and Keener were boy friend and girl friend. Hypes had a key to her apartment. He often spent the night there and he was "in and out of the apartment". Tina Keener was the sole lessee of the apartment. She had two minor children at that time and they were also "in and out of the apartment". She went to Charleston on July 30, 2007, with Hypes and some of his friends to shop and to visit with other friends. According to Keener, she has

never made methamphetamine, she knew nothing about how it is made, and she knew nothing about the needed ingredients for making methamphetamine. Keener owned finger nail polish remover. She owned a camp stove and lanterns for camping. The fuel found in the apartment was used to fuel the stove and lanterns. Rodney Hypes did not ask her to buy the fuel. Hypes did not ask her to buy ephedrine or pseudo ephedrine. App. Vol. III, pages 142-147. There was no testimony that methamphetamine was ever made in the apartment, or that any item found was purchased to make methamphetamine. No indictments were then forthcoming charging either Hypes or Keener.

On April 3, 2009, Nicholas County deputy sheriff Michael A. Hanks served warrants on Rodney Hypes for misdemeanor sudafed purchases at the residence of his parents in Irish Heights near Summersville. After being taken into custody,

Hypes executed a waiver of his Miranda rights. Hanks asked Hypes a series of questions about his knowledge of methamphetamine manufacture. Hypes' answers indicated that he was informed about how to make the substance, and that he learned how to make it from researching the Internet and from reading Uncle Fester's Cook Book. Hypes offered that he had always been interested in chemistry, and that "you actually get addicted to just cooking the dope more than using the dope. I could sit in jail for ten years, I would still be addicted to cooking it". App. Vol. III, pp. 159-162. The statement was handwritten by Hanks and signed by Hypes. There is no evidence that Hypes knew how to make methamphetamine in July 2007, though.

A pretrial motion was filed by Hypes to challenge the admissibility of the statement. A hearing was held on August 3, 2009, The basis of the objection was that the prejudicial nature of

the evidence outweighed its probative value. The state argued that West Virginia Rule of Evidence 404(b), authorized the introduction of the evidence because Hypes was knowledgeable about how to manufacture methamphetamine. The Court ultimately ruled the evidence admissible. Hypes renewed his objection at trial and it was overruled by the court, the court finding that the probative value outweighed its prejudicial effect. App. Vol. III, p. 155, lines 2-8 and lines 17-20. No cautionary or limiting instruction was requested or given.

Hypes moved the court to direct a verdict at the close of the state's evidence. The court overruled that motion with regard to count one alleging operation of a clandestine lab but did dismiss count two, the conspiracy count. The defense rested without offering any testimony.

No objection was made by the defense to the Court's

charge or to the verdict form. The defense made no objection to the closing argument made by the state or to any part of it. The jury needed but 30 minutes to reach a verdict.

SUMMARY OF ARGUMENT

Hypes made a voluntary custodial statement in 2009 about his knowledge of methamphetamine manufacturing. The statement was inadmissible because nothing it established knowledge of that process in 2007. It was not relevant, and the probative value of the evidence was outweighed by the prejudicial effect of it. Moreover, it was not evidence of a crime or wrong since knowledge is seldom a crime.

The trial court should have sustained the motion of the defense for a judgement of acquittal since there was no evidence

produced against Hypes which indicated anything other than suspicion. The court abused the discretion afforded to it when it overruled the motion.

This Court should set aside the conviction and remand the case to the Circuit Court with directions to enter a judgement of acquittal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this appeal claims insufficient evidence and an unsustainable abuse of discretion, it is appropriate for Rule 19 argument and memorandum decision.

ARGUMENT

I.

The Statement

The standard of review for an evidentiary ruling, made by a trial court is one of abuse of discretion. State v. Derr, 192 W. Va. 165, 451 S. E. 2d 731 (1994).

The court ultimately ruled that the statement made by Hypes in 2009 might be used against him to prove a crime alleged to have occurred in 2007. The statement was not an admission that he committed the crime in 2007, but rather an indication only that he knew how to commit the crime in 2009.

The court in its Order Concerning the Admissibility of

Defendant's Statement entered on August 12, 2009, found that the statement was voluntarily given and that it was admissible as the admission of a party. The court further found that the statement was relevant because it "demonstrates that defendant knew how to cook methamphetamine, was interested in chemistry and was addicted to making methamphetamine. Therefore the statement is evidence that the defendant is familiar with the components of the methamphetamine lab found in the alleged co conspirator's apartment where the defendant had been living. Moreover, the statement is evidence that the defendant used Uncle Fester's Cookbook, which was located among the items seized from the same apartment". The Court also found that the probative value of the statement was significant and that its evidentiary value outweighs the danger of unfair prejudice. See App. Vol. IV.

The Court's finding of facts are incorrect and its analysis

is flawed. Firstly, the statement does not relate back to 2007. That is, Hanks never asked Hypes, and Hypes did not say, if he knew how to make methamphetamine in 2007. Hanks never asked Hypes, and Hypes did not say, when he read Uncle Fester's Cookbook. Hanks did not ask Hypes, and Hypes did not say, when he learned to make methamphetamine by reading Internet articles. Hanks did not ask, and Hypes did not say, whether he knew anything about the things located in Keener's apartment. Hanks did not ask, and Hypes did not say, where he lived in July 2007. No person testified that anything found in the apartment belonged to Hypes, other than his medical card. Insofar as the court found that Hypes knew how to make methamphetamine and was addicted to cooking it in 2007, that finding is not supported by any evidence. Insofar as the trial court found that Hypes was interested in chemistry in 2007, that

finding is unsupported by any evidence. Insofar as the trial court found that Hypes was familiar with the components of a methamphetamine lab in 2007, that finding is without support in the record.

West Virginia Rules of Evidence, Rule 401, provides that relevant evidence is evidence which has a logical tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable. Had Hanks asked Hypes the questions mentioned above or had Hypes volunteered in his statement that he knew how to cook methamphetamine in 2007, that he was familiar with Uncle Fester's Cookbook then, that he lived with Keener, that he was addicted to cooking methamphetamine in 2007 and he was then interested in chemistry in 2007, those statements might have indeed been relevant evidence. This lawyer recently gave a friend a recipe to make ginger bread.

Possession of that recipe in 2011 and knowledge of it does not prove possession of the recipe in 2009 or knowledge of it then unless it was also stated that she knew the recipe then.

Rule 401 requires the court to determine whether the probative value of the evidence is substantially outweighed by the counter factors listed in West Virginia Rules of Evidence, Rule 403. Rule 403 requires a trial court to exclude evidence otherwise relevant when the danger of unfair prejudice, confusion or undue influence is disproportionate to the value of the evidence. State v. Derr, 192 W. Va. 165, 451 S. E. 2d 731 (1994). It was an abuse of discretion to permit the statement to be used against Hypes. The admissible evidence against him was weak, but the statement was so prejudicial that it took the jury only 30 minutes to return a verdict.

Secondly, that part of the statement that was the most inflammatory was the part of it in which Hypes stated that he was

“addicted to just cooking the dope, more than using the dope. I could sit in jail for ten years and still be addicted to cooking the dope”. App. Vol. III, page 162. Hypes admitted to a character defect that existed in 2009. West Virginia Rules of Evidence, Rule 404, provides that evidence of a person’s character is not admissible to prove that he acted in conformity therewith on any particular occasion. The statement was used by the prosecution against Hypes in order to show that Hypes was a bad man. The evidence was not Rule 404(b) evidence because it was not proof of a subsequent crime, act or wrong since Hypes never indicated that he actually cooked “dope” on any particular occasion whether in 2007 or 2009. That part of the statement did not logically prove that Hypes was guilty of crimes alleged in the indictment. Rules 402, 403 and 404 required exclusion of the evidence, and it was an abuse of discretion to admit that part of the statement.

II.

THE TRIAL COURT SHOULD HAVE GRANTED THE MOTION OF THE DEFENSE FOR A JUDGMENT OF ACQUITTAL

Hypes moved the court to direct a verdict in his favor at the end of the prosecution case. The standard of review is one of an abuse of discretion. Without making any findings of fact, the court denied the motion with regard to Count One but granted the motion on Count Two. App. Vol. III, p. 170. The attorney for the state argued that the evidence existed in three categories.

First was the trash bag evidence. Gretchen Roop watched Hypes carry a bag of trash from Keener's apartment "carefully" and she saw him deposit it the garbage in the dumpster. She retrieved the bag and phoned the police because she found some things in it that she thought might be used to make methamphetamine. The

police found a HEET bottle, numerous unspecified empty blister packs, match books with striker pads removed, coffee filters and peroxide bottles. There was also mail addressed to Tina Keener in the bag. No evidence was presented that Hypes knew the contents of the bag. No evidence linking Hypes to the bag was found in it. None of his mail was found and his fingerprints were not found on any of the items in the bag. This evidence only proves that Hypes took out the garbage for his girlfriend.

Second, there was the contents of Keener's apartment.

A number of items were found in it that could be used to manufacture methamphetamine. The only thing found in Keener's apartment that belonged to Hypes was his medical card. No mail addressed to him was found in it. None of his clothes were there. None of his fingerprints were found on any of the suspicious items, including Uncle Fester's Cookbook. The apartment was leased to

Keener alone. Many of the suspicious items were identified by Keener as belonging to her. No person offered any testimony that Hypes made methamphetamine in the apartment, that he purchased any of the suspicious items or that he knew they were there. No evidence connecting Hypes to Uncle Fester's Cookbook was offered. The best evidence is that all of the items belonged to Keener and they had been purchased by her.

Last is the statement given by Hypes in 2009. In it, he stated that he was generally aware of the manufacturing process of methamphetamine, that he was addicted to cooking dope and that he would remain addicted to cooking dope. Nowhere in it does he say that he knew how to make methamphetamine in 2007, that he was addicted to cooking dope in 2007, that he was familiar with the contents of Uncle Fester's Cookbook in 2007, that anyone made methamphetamine in Keener's apartment in 2007, that he had

purchased any of the items found in Keener's apartment in 2007, that he knew that the chemicals and other items were there, or that he knew the contents of the garbage bag.

It seems, then, that the entire case against Hypes was that he spent the night with Keener, his girl friend, on a regular basis; that he carried out the garbage for her; that he left his medical card there and that he knew how to make methamphetamine in 2009.

West Virginia Code Section 60A-4-411 (2003), requires that the state prove that Hypes assembled the items found in Keener's apartment. The evidence suggests that Keener did so rather than Hypes. She admitted that she purchased the Coleman fuel and that she owned the nail polish remover. It was her apartment. Only property identifiable as belonging to Keener was found in the garbage bag.

Next the state must prove that the items were assembled

solely for the purpose of making methamphetamine. The items could have been purchased for many lawful purposes. Finger nail polish remover is used to remove finger nail polish. Coffee filters are used to make coffee. Hydrogen peroxide has many useful household purposes as a bleach alternative. Matches may be used to light candles. Fuel may be used for garden torches or camping. Plastic tubing can be used to supply water to ice makers.

In order to establish constructive possession of chemicals and or equipment used for manufacture of methamphetamine, the state was obliged to prove beyond a reasonable doubt that Hypes had knowledge of the presence of the items and that such items were subject to his dominion and control. State v. Cummings, 220 W. Va. 433, 647 S. E. 2d 869 (2007).

Hypes was not at 223 Dylan Heights Apartment when the apartment was searched. Keener was the only lessee. No person

ever testified that Hypes had any knowledge of the presence of the items found in the search. There was no physical evidence in the form of fingerprint evidence or any other evidence to link him to those items. No person gave testimony that he assembled the items. All of the items found were under the dominion and control of Keener. There is a total lack of evidence to establish either actual or constructive possession by Hypes of the items found in the search. The refuse found in the trash bag placed in the dumpster by Hypes did not constitute proof of any crime because those things could no longer be used to make methamphetamine and because there is no proof that Hypes knew the contents of the bag.

In State v. Cummings, 220 W. Va. 433, 647 S. E. 2d 869 (2007), this Court reversed the conviction of Cummings due to lack of evidence. Cummings was operating an automobile owned by a James Foreman which was stopped by a police officer for a traffic

violation. Cummings' wife, Amy, was seated in the back and a Rachel Pritt was seated in the front passenger side. The police officer asked to see the vehicle registration. Amy Cummings told the officer that she was not the owner of the vehicle and asked for leave to look in the glove box to locate the requested documents.. Permission was given initially but revoked when the officer could not see her hand in the box. All of the occupants were removed from the vehicle for officer safety. A bag containing six boxes of pseudoephedrine was found in the rear floorboard of the car. A bag containing 300 match books and twenty syringes was also found in the rear floorboard behind the passenger seat.

Cummings was arrested and subsequently charged by the grand jury with five felony counts including operation of a clandestine drug laboratory and conspiracy to operate such a

laboratory. The only evidence offered was the testimony of the arresting officer and the cold medicine, matches and syringes. No evidence was presented to establish that the any of those items belonged to Cummings, that he had purchased them or that he was aware of their presence in the vehicle. Cummings moved for a judgement of acquittal at the end of the state's evidence arguing that there was no evidence to connect him with the items found in the rear floorboard, that there was no proof that he assembled the items to make methamphetamine, and lastly there was no evidence of a conspiracy other than being in the same car with his wife, and alleged co-conspirator, Amy Cummings. The trial court overruled those motions and Cummings was convicted by the jury. He appealed his convictions.

This Court reversed the convictions and awarded

Cummings a new trial on the other charges noting that Cummings could not be re tried on the conspiracy and operation of a clandestine drug lab charges due to the prohibition against twice being placed in jeopardy. In doing so, the Court explained that the state failed to provide any forensic evidence such as fingerprints on the cold medicine or matches. The state offered no evidence of ownership of the property other than that Cummings was the driver of the car in which the items was found. He was not the owner or lessee of the vehicle. The Court observed that the items could have belonged to either of the other two occupants. No evidence was presented that Cummings had purchased any of the items, including a receipt or the testimony of a sales person. There was no evidence that Cummings was aware of the presence of the items in the vehicle prior to the discovery of them by the officer. By way of summary, the Court noted that there was simply no evidence to

support an inference of actual or constructive possession. “Absent such a finding, the that the Appellant was assembling the materials for the purpose of manufacturing methamphetamine is therefore not plausible.”

Hypes is similarly situated. The apartment was not his. There is no evidence that he kept any of his belongings, including clothing there. There was evidence produced that he knew that the items seized were in the apartment. There is no forensic evidence such as fingerprints on any of the items seized, including those in the trash bag. No evidence of purchase was provided by the state. Keener was called as witness by the state but she did not testify that any of items seized were purchased by Hypes or that they belonged to him. There were no controlled substances found and no precursor substances for the manufacture of methamphetamine were located by the police in the apartment. There was testimony about empty

blister packs in the trash bag but no evidence that the packs ever contained ephedrine or pseudoephedrine. Methamphetamine cannot be manufactured without them. The evidence was simply insufficient to establish that Hypes constructively possessed the items alleged to have constituted a clandestine drug lab.

Although the ruling of the trial court in ruling on a motion for a judgment of acquittal is entitled to great weight, the trial court's ruling will be reversed on appeal when it is clear that the Court has acted under some misapprehension of the law or the evidence. "The function of an appellate court when reviewing the sufficiency of the evidence to support a conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince impartial minds of the defendant's guilt beyond a reason doubt. State v. Guthrie, 194 W. Va. 657, 461 S. E. 2d 163 (1995).

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The court made no findings and denied the motion for judgement of acquittal without explanation or comment. It is clear from the record, however, that, at best, the evidence produced against Hypes rose only to the level of proof of “suspicion” beyond a reasonable doubt rather than guilt. The trial court abused its discretion. The motion for judgement of acquittal should have been granted.

CONCLUSION

Hypes was convicted based upon evidence which was legally insufficient to sustain his conviction. His conviction must be set aside and remanded to the Circuit Court with directions to enter a judgment of acquittal.

Respectfully submitted,
Rodney L. Hypes

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,
Appellee,

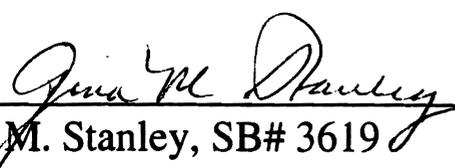
v.

Docket No. 11-1273

Rodney Hypes, Sr.,
Appellant.

Certificate of Service

The undersigned counsel for Rodney Hypes, Sr. certifies that she delivered a copy of the Brief and Appendix to Jacob Morgenstern at his office at 812 Quarrier Street, 6th Floor, Charleston, WV 25301, on the 28th day of November, 2011.


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