

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOV 2 | 2011

NO. 11-1014

STATE OF WEST VIRGINIA

*Plaintiff Below,
Respondent.*

v.

TERRY ALLEN BLEVINS,

*Petitioner Below,
Petitioner,*

REPLY BRIEF ON BEHALF OF THE PETITIONER

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Comes now the Petitioner, TERRY ALLEN BLEVINS, by his attorneys, David B. Kelley and Paul R. Cassell, and files the within reply brief.

I.

STATEMENT OF THE CASE

Petitioner affirms the Statement of the Case submitted within the Appeal requesting only to include the following for clarification:

On April 9, 2010, a Motions Hearing was held wherein the State advised the Court of several issues relating to the physical evidence which had not been communicated to the Court or to the Defense Attorneys prior to said hearing. At said hearing, the Court was advised that (April 9, 2010 transcript, pg. 57) the “set of keys” which had previously been at issue due to a defective warrant motion had been used by the family of the victims at some prior point in time to “cut” new keys for the victims' automobiles. Additionally, with regard to said “set of keys” the Prosecutor advised the Court that one of the keys on the “set” was found to unlock a pad lock which had to be cut off at the crime scene to obtain access to one of the victims (April 9, 2010 Transcript, pg 59.) The Prosecutor advised the Court that this information was disclosed to him “yesterday.”

II.

SUMMARY OF ARGUMENT

The “set of keys” located at the Petitioner’s home should have been suppressed as there was a breach in the chain of custody as the Prosecutor’s suggestion that the victims’ family used said keys to “cut” additional keys raises questions of the condition of the “set of keys”.

III.

STATEMENT REGARDING ORAL ARGUMENT

As stated in Rule 18(a) of the Revised Rules of Appellate Procedure, in regard to the criteria for oral argument, "oral argument is unnecessary when:

- (1) all the parties have waived oral argument; or
- (2) the appeal is frivolous; or
- (3) the disparities issue or issues have been authoritatively decided; or
- (4) 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."

Under the above-stated rule, the Appellant avers oral arguments are not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

IV.

ARGUMENT

THE LOWER COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE THE "SET OF KEYS" WHICH WERE FOUND AT THE PETITIONERS HOME.

Petitioner and Counsel assign as error the insufficiency of the evidence supporting the Petitioner's conviction. Specifically, Petitioner and Counsel were presented with inconsistencies in Detective Gills' testimony at trial and the State's admission during a Motions Hearing five days prior to trial regarding the chain of custody of a "set of keys" which were found at the Petitioner's residence and subsequently, despite Petitioner's objection, entered into evidence at trial (raised and preserved in the original Appeal Brief, page 22).

The original objection of Petitioner's Counsel had been that, as the "set of keys" were attributed as belonging to the victims via their function, that of operating the victims'

automobiles, Petitioner's Counsel was concerned that said Counsel had not had the opportunity to inspect the keys in the presence of the vehicles to verify such use. Counsel had been informed previously by the State that the vehicles were no longer available.

While the trial transcript and transcripts of prior motions hearings indicate the conversations among counsel, Court, and State are muddled and disjointed, Petitioner's counsel's objection concerns breaches in the chain of custody which were discovered five days prior, when, during a suppression hearing regarding the set of keys, Prosecutor Ash stated (April 9, 2010 Motions Hearing, pg. 57):

MR. ASH: (Attorney for the State) Yeah. The key fob, it – I discussed it with Mike Gill relatively recently. We know they worked because when they got – they had to get another one, but the keys to the car worked. In fact, the testimony will be that, when the family of the victims needed keys for the vehicles, they were cut from those that are in evidence.

THE COURT: So what do you want to do –

MR. KELLEY: (Defense Attorney) We weren't told that.

THE COURT: So what do you want to do with –

MR. KELLEY: That's something we were never made aware of.

THE COURT: So what? I mean, I'm just not getting it.

MR. CASSELL: (Defense Attorney) I don't – it's not an issue with what they've described, Your honor. We didn't know the last statement that Mr. Ash provided.

However, as counsel for the State indicated that Detective Gill's testimony would include a possible breach in the chain of custody regarding said "set of keys", Petitioner's Counsel became aware of this second issue surrounding the keys.

Petitioner's Counsel asserts that the keys leaving the evidence locker for the victim's family to "cut keys" raises questions as to admissibility based upon the "likelihood of intermeddlers tampering with" said evidence. (*State v. Davis, 164 W.Va. 783, 266 S.E. 2d 909 (1980)*). Further, without prior knowledge as when the keys were removed from said evidence locker, Defense Counsel does not know if the keys were removed before. or after said keys were tested to work on the "pad lock" which was also admitted into evidence, before or after the keys were made available to Defense Counsel for inspection, or even if the keys presently included in the "set of keys" are the same in number and function as those obtained during the search warrant.

To further muddy the waters, at trial, Detective Gills testified (Trial Transcript Volume II, pg 264):

MR. ASH: Let me show you what's been marked as State's Exhibit Number 7. It shows a couch, a search warrant, appears to be a search warrant, and a set of keys that you saw at the Petitioner's house?

DETECTIVE GILLS: Yes.

MR. ASH: And are those that set of keys right there?

DETECTIVE GILLS: Yes.

MR. ASH: Where have those been since – since they were picked up at the Petitioner's house?

DETECTIVE GILLS: In evidence.

MR. ASH: They've been taken only for I guess a couple of hearings, or –

DETECTIVE GILLS: Yes.

MR. ASH: -- to show Defense Counsel?

DETECTIVE GILLS: Yes.

Contrary to the State's disclosure in the Motions Hearing of April 9, 2010, Detective Gills did not in fact testify as to the same chain of custody as disclosed previously.

On page 262 of Volume II of the Trial transcript, Petitioner's Counsel Cassell states relative to the admission of the set of keys into evidence, "Just for the record, what we're objecting to is the chain of custody. No officer can ---"

Further, with respect to the Brief on Behalf of the Respondent, Petitioner wishes to address an erroneous statement regarding the admission of the keys. Namely, Respondent's Brief asserts that the "Petitioner admitted in telephone calls that he picked the keys up at the victim's house and placed the keys in the duffle bag." (Respondent's Brief, pg 31). Petitioner asserts that there was no admission as to where the keys were picked up. The Trial Transcript did not include the transcription of the recordings played for the jury; however, the segments to be played for the jury were entered in the record at the April 9, 2010, Motions Hearing. Careful review of the section regarding the keys reveals only that the Petitioner stated "I picked them up." (April 9, 2010, pg. 24) There is no elaboration as to where the keys were picked up, nor is there any admission as to picking the keys up at the victim's residence.

In light of the breach of chain of custody, Petitioner's Counsel reasserts that the recorded telephone conversations relating to the keys should not be admitted as said conversations become irrelevant and have extreme prejudicial impact. At the April 9, 2010 Motions Hearing (pg. 26) the Court ruled regarding said recorded conversation:

THE COURT: All right. I'm going to let that come in. again, too, again because of the relevance of the issue of the keys. All right.

V.

CONCLUSION

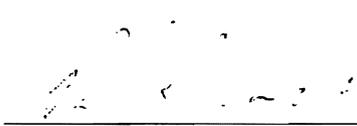
Based upon the foregoing statement of facts and legal arguments, the Petitioner respectfully requests that this matter be reversed and a new trial granted to the Appellant with instructions set forth by this Honorable Court.

Respectfully submitted this the 1st day of November, 2011.

TERRY ALLEN BLEVINS.
By Counsel.



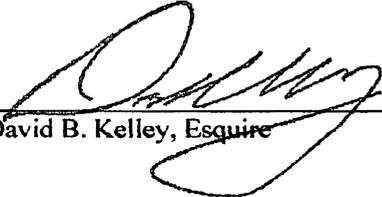
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CERTIFICATE OF SERVICE

I, David Kelley, the undersigned, do hereby certify that I have served a true copy of the foregoing pleading upon counsel for the State of West Virginia, via U. S. Mail, postage prepaid, to Laura Young, Assistant Attorney General, 812 Quarrier Street, 6th Floor, Charleston West Virginia, 25301, and Scott Ash, Mercer County Prosecuting Attorney, 120 Scott Street, Suite 200, Princeton, West Virginia 24740, on this ____ day of November, 2011.



David B. Kelley, Esquire