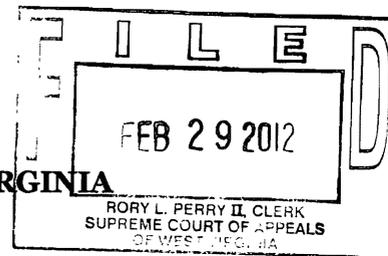


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 11-1617



**DAVIS WOLVERTON**

Petitioner

V.)

**STATE OF WEST VIRGINIA,**

Respondent

Appeal from a final order  
of the Circuit Court of Webster  
County (11-F-6)

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**Petitioner's Brief**

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**Counsel for Petitioner, Davis Wolverton**

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## **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ERRED IN NOT STRIKING THE TESTIMONY OF THE CONFIDENTIAL INFORMANT.
2. THE CIRCUIT COURT ERRED IN NOT DIRECTING A VERDICT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF.
3. THE CIRCUIT COURT ERRED IN NOT GRANTING THE DEFENDANT A NEW TRIAL BASED ON THE PROSECUTOR'S PRESENTATION OF FALSE EVIDENCE.
4. THE CIRCUIT ERRED IN ALLOWING A HUSBAND AND WIFE TO SIT ON THE SAME JURY ON A MULTI-DAY TRIAL.

## **STATEMENT OF THE CASE**

In the instant case, the Defendant was charged with Delivery of a Controlled Substance, Conspiracy, and Gross Child Neglect Creating Substantial Risk of Serious Bodily Injury or Death. (A.R.1) The State of West Virginia alleged that Mr. Wolverton, along with his mother, sold prescription medication to a confidential informant, from their home which they shared with Mr. Wolverton's minor children. The alleged sequence of events was that the informant was dropped off near the Wolverton residence after dark by law enforcement. (A.R.189-193) Some period of time later, the informant returned to the officers' vehicle. (A.R. 199) As the Law Enforcement Officers testified that they could not see the informant during the time of the alleged drug transaction, the only witness or evidence presented by the State as to the actual alleged transaction was through this informant. (A.R. 341-342) During the jury trial, this informant testified that he had limited contact with the defendant and had possibly been to his residence one time a long time ago. (A.R.213) This testimony was in complete contradiction to previous sworn testimony given by the informant.

The case was eventually submitted to the jury and a verdict of guilty was pronounced. The Defendant was sentenced to a term of 1-15 for Delivery, 1-5 for Conspiracy, and 1-5 for Gross Child Neglect. The sentences for Counts 1 and 2 were run concurrent and consecutive to Count 3. Counts 1 and 2 were suspended and the Defendant was placed on Home Confinement. Upon Completion of the Home Confinement, Mr. Wolverton was sentenced to five years of probation. (A.R.15)

### **SUMMARY OF ARGUMENT**

The prosecuting attorney submitted evidence to the jury that he knew to be false and no correction was made to the jury. As a result, the jury was unaware of the false testimony by the State's only substantive witness and based its conviction on the same.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Because the principle issues in this case have been authoritatively decided in State ex rel. Franklin v. McBride, *infra*, oral argument under Rev. R.A.P. 18(a) is 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.

## **ARGUMENT**

1. THE CIRCUIT COURT ERRED IN NOT STRIKING THE TESTIMONY OF THE CONFIDENTIAL INFORMANT.
  
2. THE CIRCUIT COURT ERRED IN NOT DIRECTING A VERDICT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF.
  
3. THE CIRCUIT COURT ERRED IN NOT GRANTING THE DEFENDANT A NEW TRIAL BASED ON THE PROSECUTOR'S PRESENTATION OF FALSE EVIDENCE.

As the argument for the first three assignments of error flow from the same law and circumstances, Petitioner will address them jointly. The primary basis for this appeal centers around the perjury or false swearing of the State's key witness. As was set forth in the Statement of the Case, the only witness that the State presented to the alleged drug transaction was the informant Mr. Payne. Mr. Payne testified that he was merely acquaintances with the Defendant and that he had been to the Defendant's home perhaps only once at some point in the past. (A.R.213) This testimony was in direct conflict with prior sworn testimony that he had given. The Prosecuting Attorney acknowledged the inaccuracy of the testimony in a sidebar in which the Prosecuting Attorney attempted to assert that the witness misunderstood the questioning which argument the Court dismissed immediately. (A.R.229-230) The Prosecuting Attorney admitted to knowing the testimony was false, however in the ensuing redirect of the same witness immediately following the sidebar, the Prosecuting Attorney made no attempt to correct the testimony. (A.R.231-238, 248) Thereafter, the informant continued to lie about his involvement with the Defendant even when presented with the transcript of his prior testimony. (A.R.239 - 250) The Prosecutor's willful presentation of the false testimony was driven home, however in his closing argument where he argued that the reason the informant knew about the layout of the home was not because he had been to the home any number of times, as was stated in the informant's prior testimony, but because he had been there that night. (A.R.477-480)

State ex rel. Franklin v. McBride, 226 W.Va. 325, 701 S.E.2d 97 (2009) addresses the issue of a prosecuting attorney knowingly presenting false evidence directly. In that case, the Court set forth a three-prong test: "In order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict." It is absolutely uncontroverted that the informant testified falsely at trial. The prosecuting attorney knew that this testimony was false as he admitted during the hearing on post-trial motions. (A.R. 508) The prosecutor asserts that he did not know that the witness would testify falsely until the testimony came out. However, the prosecutor took no action to correct the testimony that he knew to be false. (A.R. 231-238, 248) In fact, as was stated hereinabove, he used that testimony in his closing argument., a fact which was pointed out by the lower court. (A.R. 510)

The third prong of the test is ordinarily the most difficult. However, in the instant case, the State only presented one witness to the alleged transaction. That witness was the informant who testified falsely. As the lower court indicated at the post-trial motion hearing, without the testimony of the informant, the state did not have a case. Because of the crucial nature of this one witness to the outcome of the case, every issue of credibility of that witness becomes key. Further, for the State to fail to correct the testimony it knew to be false and then rely on the same during closing argument when the Defendant had no ability to respond is clear use of that false evidence to materially affect the outcome of the trial. Petitioner argues that false information about why the informant knows about the interior of the Defendant's home and how he would have knowledge of the family and medications they may be on clearly is material to the credibility of the witness, and as there was only one witness, it becomes extremely material to the ultimate outcome of the trial.

Further, the New York Court of Appeals addressed this issue directly in People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.W.2d 885, 887, 136 N.E.2d 853, 854, 855, "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. \*\*\* That the district attorney's silence was

not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.”

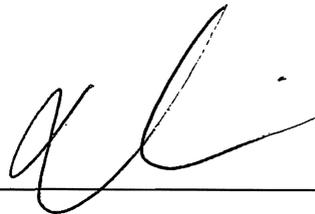
4. THE CIRCUIT ERRED IN ALLOWING A HUSBAND AND WIFE TO SIT ON THE SAME JURY ON A MULTI-DAY TRIAL.

In the instant trial, the Court permitted a husband and wife to sit on the same jury panel. Petitioner objected as it gave an appearance of impropriety and further ignored human nature that the couple could refrain from deliberating outside the presence of the other jury members during breaks in this multi-day trial. As the petitioner argued in the lower court and set forth in his Notice of Appeal, he has found no support either for or against this position other than the aforementioned appearance of impropriety and likelihood of violation of the Court’s instructions. Petitioner believes that this is an issue that should be addressed by this Court.

**CONCLUSION**

Because of the State’s presentation clearly false testimony of the State’s only direct witness and the material effect it had on the jury verdict, the Petitioner respectfully requests that this Court set aside the jury trial and remand the matter for a new trial.

**Signed:** \_\_\_\_\_



Daniel R. Grindo (WVSN 9131)  
Counsel of Record for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of February, 2012, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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Signed: \_\_\_\_\_



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