



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 11-1642

KATHRYN WOLVERTON

Petitioner

vs.

**(Appeal from a Final Order of the
Circuit Court of Webster County,
West Virginia, 11-F-7)**

STATE OF WEST VIRGINIA

Respondent.

PETITIONER'S BRIEF

Counsel for Petitioner, Kathryn Wolverton

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ASSIGNMENT OF ERRORS

The Court erred in not excluding from the evidence of the testimony, or striking the same, of P. J. Payne, as it was clearly false, as compared to the testimony which was elicited from him in Case No. 10-JA-1, 2, and 3, in the Circuit Court of Webster County, West Virginia, on the 8th day of March 2010. And further, as a result of thereof, the lower Court erred in failing to set aside the verdict rendered in the jury trial, as it was clear that the testimony of P. J. Payne, the alleged confidential informant, and primary witness for the State, testified falsely, which testimony the prosecuting attorney knew was false, and was relevant and material to the decision of the jury, and such verdicts would not have been obtainable without such testimony. It was clear that the prosecuting attorney knew that the statements were false at the time of the witness making the same, allowed the same to be offered into evidence, and then relied upon the statements in his closing to the jury. See *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97, 2009, Syllabus Point 2.

STATEMENT OF THE CASE

This action was a criminal case instituted in the Circuit Court of Webster County, West Virginia, pursuant to an indictment returned against the petitioner herein on the 11th day of January 2011, in which her son, Davis Wolverton was also named as a co-defendant, his case being number 11-F-6. The petitioner was charged in a three (3) count indictment with (1) delivery of a controlled substance, to wit: morphine, a scheduled II controlled

substance, (2) conspiracy, and (3) gross child neglect creating risk of serious bodily injury or death. All three counts arise out of a single alleged incident of the delivery of the controlled substance to a confidential informant, Philip J. Payne on the 12th day of January 2010. The petitioner denied any guilt or responsibility, denied the presence of the informant in her house on January 12, 2010, and demanded a jury trial thereon. A trial was held in the Circuit Court of Webster County, West Virginia, with Judge Jack Alsop presiding, on the 4th and 5th days of August 2011. At the conclusion of the trial, the jury returned a verdict against both defendants on all three (3) counts. The defendant timely filed here post-trial motions, and a hearing was held before Judge Alsop on the 30th day of September 2011, at which time the motions of the petitioner herein was denied and the court deferred the imposition fo any sentence against Mrs. Wolverton, and instead placed her upon probation for a period of five (5) years. To the findings of the court, the petitioner herein has taken this appeal.

SUMMARY OF ARGUMENT

The primary evidence, as to the commission of the alleged offenses, was the testimony of Philip J. Payne, a confidential informant, for the West Virginia State Police. It was only his testimony that related to any evidence against Mrs. Wolverton being present during the commission of the alleged offenses, and that the offenses even took place, though the officers of the state police were parked down the street, they could not see what occurred, or

if Mr. Payne even went into the defendant's home. Based upon his testimony, which was clearly false in several material aspects, the conviction was obtained. The relevant false part of Mr. Payne's testimony that was false, was that he had only seen the defendant a couple of time in the previous six (6) months, when at a prior hearing in an abuse and neglect case he had testified that he road with him to Beckley several days each week, and that he had been to and within his home on numerous occasions. At the trial he only stated that he had been there twice, the second time being the date of the alleged offense, and through this testimony was able to state the lay-out of the defendant's home, thereby giving credence to the fact that he must have entered into the defendants' home on that occasion, otherwise, he would not have been able to describe the lay-out of it. The prosecuting attorney knew the evidence as to association and visits by Mr. Payne on previous occasions was false, but allowed the same to be entered into evidence. Then to compound that problem, the prosecuting attorney in his closing argument stressed the fact of his having been in the home on that date, otherwise again, he could not have described the same.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided in the Court's decision in *State ex rel. Franklin v. McBride, infra*, oral argument under Rev. R.A.P. 18(a) is not necessary and the Petitioner herein waives the same, unless the Court determines that other issues arising upon the record should be addressed.

ARGUMENT

The Court erred in not excluding from the evidence of the testimony, or striking the same, of P. J. Payne, as it was clearly false, as compared to the testimony which was elicited from him in Case No. 10-JA-1, 2, and 3, in the Circuit Court of Webster County, West Virginia, on the 8th day of March 2010. And further, as a result of thereof, the lower Court erred in failing to set aside the verdict rendered in the jury trial, as it was clear that the testimony of P. J. Payne, the alleged confidential informant, and primary witness for the State, testified falsely, which testimony the prosecuting attorney knew was false, and was relevant and material to the decision of the jury, and such verdicts would not have been obtainable without such testimony. It was clear that the prosecuting attorney knew that the statements were false at the time of the witness making the same, allowed the same to be offered into evidence, and then relied upon the statements in his closing to the jury. See *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97, 2009, Syllabus Point 2.

The ruling of the West Virginia Court of Appeals in the case of *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97, 2009, Syllabus Point 2, stated, "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." In the present case it is clear in this case that the testimony of P. J. Payne, the alleged confidential informant, that he had been in the home of defendant on

only two occasions, (one of which would be the present occasion) and that he had not talked with the defendant, Davis Wolverton, other than on the date in question, were clearly false. (A.R. 213-214) and (A.R. 227-228).

After the foregoing testimony by Mr. Payne, a side-bar held with the presiding Judge, in which the prosecuting attorney advised the court that Mr. Payne was not being forthright, and must not have understood the cautionary instruction that he had given him regarding his testimony. (A.R. 230).

The foregoing clearly shows that the prosecuting attorney was aware that Mr. Payne was not being truthful about his interactions with the defendant, Davis Wolverton, his number of contacts and the times that he had been at the residence.

If that was all there was then it may be argued that it was just a credibility issue and not material. But in this case, since the defendants' position was that Mr. Payne was not in their residence on January 12, 2010, he knowledge of the interior of the home became relevant and material to the state being able to establish its case.

Then during the closing argument, the prosecuting attorney made the following statements for the jury consideration (A.R. 478-479):

“In order for you to believe that, you have to believe that Mr. Payne, who was certainly not a rocket scientist, knew -- and who Chris Wolverton says, by the way, never seen -- he'd never seen him in the house, but: knew the layout of the house; knew that

Kathryn Wolverton had a prescription for 60 milligram morphines, Kadians; knew where she kept those pills; knew that the kids were there that night; was dropped off by the officers; went up on the porch; waited until they pulled away; went somewhere else; got pills identical to the prescription Kathryn Wolverton has; hid the \$120 somewhere; came back; and gave the officer the pills and said that got 'em in there. That's what you have to believe if you believe P.J. Payne didn't go in that house.

Now, let me ask you, do you really think that P.J. Payne could come close to describing any one of your houses or any one of your prescriptions or where you kept them? The only explanation is, he was in that house and he saw where she got the pills from."

The crux of the defendant's case was that Mr. Payne did not come to their residence, or at least did not come into the residence that night, and that none of the members of the household had any contact with Mr. Payne on the evening of January 12, 2010. While the State's position was that it must have occurred, otherwise, Mr. Payne would not have been able to describe the interior of the house. The prosecuting attorney knew that this testimony was false, and attempted to clarify it in a side-bar, which clarification or correction did not occur. Further, when questioned about his prior inconsistent statement, and traveling with Davis Wolverton on a daily basis for five (5) to six (6) months to Beckley and back, Mr. Payne denied any such occurrence (A.R. 239-240).

In the previous hearing on the abuse and neglect case, the prosecuting attorney, Mr. VanDevender had asked Mr. Payne if he knew Mr. Wolverton, and if so, how did he know, him, to which he responded that he hung out with him. Later, he was question by Ms. Morton in the proceeding, and asked if he had been to Mr. Wolverton' home from time to time, to which he responded "yes, ma'am".

It is clear from the foregoing that not only were the statements made at the trial false, but that the prosecuting attorney knew they were false at the time. This is not to say that the prosecutor was attempting to solicit or introduce false testimony, just that he knew that the testimony was false. Thus, the first two (2) conditions set forth in *State ex rel. Franklin v. McBride*, 226 W.Va. 325, 701 S.E.2d 97, 2009, Syllabus Point 2 have clearly been satisfied. The third prong of the test is was the testimony not just false, but it material to the outcome, of the case, and this is most applicable in this case. The defendants state that Mr. Payne was not even at their house on the night in question, but the state countered, with that Mr. Payne would not have been able to testify as to the lay-out of the residence if he had not been there. That the jury should just use their collective common sense and realize that his presence in the home on the night in question was proven by that fact. Thus, it is more than just a credibility issue, as to which testimony was more credible, that of the defendants' witnesses, or that of Mr. Payne. It is clear that he was able to with some clarity, though not perfectly, describe the interior of the residence, and since according to him, he had only been one time

previously, it became very material for him to be able to describe the interior of the residence for the jurors, to bolster the state's case.

It is clear that other courts when looking at convictions which were obtained utilizing false testimony have held that such lacks fundamental fairness to the defendant and constitutes a denial of due process. The United States Supreme Court stated "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is an inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." Stated in *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

Further in the case of *Napue v. People of the State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), it stated that it was established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the **Fourteenth Amendment**, *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; *Pyle v. State of Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214.... It went on to state "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given

witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.”

Additionally, the Court of Appeals for New York, in *People v. Savvides*, 1 N.Y.2d 554, 557, 154 N.Y.S.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.”

Thus, it is clear that false testimony was presented to the jury in the present case, that it was known at the time to be false, that such testimony was not corrected by the prosecuting attorney, and then was relied upon to bolster his closing argument to the jury. All of which denied to the defendant a fair and just trial, and constituted a denial of due process to her.

CONCLUSION

The verdict returned by the petit jury in the Circuit Court of Webster County in the present case should be set aside and the matter remanded back to the Circuit Court for further proceedings as the Court may deem appropriate.

Signed: 
Bernard R. Mauser
State Bar #2370
Counsel for the Petitioner

CERTIFICATE OF SERVICE

I, Bernard R. Mauser, the undersigned attorney do hereby certify that true copy of the foregoing Petition for Appeal was mailed to **Dwayne VanDevender, Esq.**, Webster County Prosecuting Attorney, 137 S. Main Street, Webster Springs, West Virginia 26288, and was mailed to **Daniel R. Grindo, Esq.**, 624 Elk Street, Gassaway, West Virginia 26624, and to **Scott Johnson, Esq.**, Office of the Attorney General for the State of West Virginia, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301, on this the 28th day of February 2012.



BERNARD R. MAUSER