
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1642

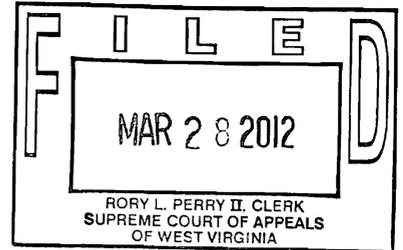
STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

KATHRYN WOLVERTON,

*Defendant Below,
Petitioner.*



STATE'S BRIEF

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STATE'S BRIEF

I.

ASSIGNMENTS OF ERROR

The Petitioner contends that the State knowingly used perjured testimony against her and that she has satisfied the requirements for relief under *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2009). As she has neither in fact nor law demonstrated a right to relief, the circuit court should be affirmed.

II.

STATEMENT OF THE CASE

Phillip "P.J." Payne volunteered to assist the State Police in order to minimize the impact of his prior drug offenses. App. 187. On January 27, 2010, Mr. Payne had a face to face meeting with Davis Wolverton, who is the Petitioner's son, who told Payne that Payne could purchase some pills

from him. *Id.* Payne made arrangements to buy the pills, and then contacted State Police Sergeant Andrew Shingler to tell Shingler that he [Payne] could purchase some controlled substances from Davis. *Id.* 188-89, 303.

Sergeant Shingler met with Payne and searched him to ensure that Payne had no pills or money with him. *Id.* 189, 303-04, 305. Payne denied having any controlled substances on him, *id.* 189, which Sergeant Shingler confirmed. *Id.* 305. Sergeant Shingler also confirmed Payne had no money. *Id.* 305. Sargent Shingler then gave Payne some money and he and Sergeant Shingler, *id.*, 190, along with State Police Sergeant Michael Anderson who was driving the trio, *id.* 254, went to Davis's house. *Id.* 173. Payne got out of the unmarked police vehicle, *id.* 254, and went to the Davis's door, *id.* 176, which was answered by two children who called Davis "dad." *Id.* 194. After entering the house, *id.* at 193, Davis told Payne, "'You finally made it over.'" *Id.* 195. The Petitioner walked into a room, *id.* 197, got two pills from a pill bottle, *id.*, and handed the pills to Davis at which point Payne gave the money to Davis who in turn gave the pills to Payne. *Id.* 195-96, 197. Payne thanked Davis and left the house. *Id.* 199. Payne testified he went no where but Davis's residence when the police dropped him off, *id.* 200, and when he left the residence he went no where other than back to the car with Sergeants Shingler and Anderson in it. *Id.*

The pills Payne bought from Davis were marked "Kadian 60 milligrams," and, after performing three tests, State Police Chemist Farrah Machado, who the circuit court recognized as an expert, opined that the pills the Petitioner sold to Payne were tablets, that contained morphine a Schedule II controlled substance, a narcotic. *Id.* 285-86.

Consistent with the charges in the indictment, *id.* 1-4, the jury found the Petitioner guilty of one count of delivery of a controlled substance, *id.*, 485, one count of conspiracy to deliver a

controlled substance, *id.*, and one count of gross child neglect creating risk of seriously bodily injury or death. *Id.*

In post-trial motions the Petitioner first asserted that she was entitled to have Payne's testimony struck since Payne admitted to having perjured himself. *Id.* 501.¹ Specifically, it appears that the argument was that Payne had testified in a civil abuse and neglect proceeding testifying that he had been in Davis's house many times, *id.* 504, but that at trial he testified he had only been there just twice. *Id.* 213.² Additionally, it appears that Payne violated a pre-trial order not to discuss that he and the Petitioner had gone to a methadone clinic together. *Id.* 230. *Compare id.* at 228:

Q You [Payne] didn't ride with him [the Petitioner] anywhere?

A No, sir.

Q Never.

MR. VANDEVENDER: Your Honor, may we approach just briefly?

THE COURT: No. Objection's overruled.

BY MR. GRINDO:

Q You're absolutely sure about that?

A Yes, sir.

Q You didn't ride to Beckley on a daily basis?

A No, sir.

¹The actual written motion is not in the Appendix; the statements and arguments of the Petitioner's counsel are drawn from the post-trial motions hearing.

²The Petitioner's Brief states that "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." Pet'r's Br. 3. Payne testified it was "a couple," which was just twice. App. 213.

Q And you realize you're under oath; right?

A Yes, sir.

At a bench conference, the Prosecuting Attorney asserted to the Court that "apparently Mr. Payne misunderstood --" *id.* 230, to which the circuit court responded, "I don't think so -- . . . I'm not going to listen to an argument he misunderstood." *Id.* The circuit court then told counsel for the Petitioner's co-defendant in reference to the methodone clinic, "Well, I said the State wasn't, because I think it's [sic] prejudicial effect outweighs the probative value. If you want to open it up, that's up to you. I think you can ask the question without mentioning about the methadone clinic Whatever you want to open you, you can open up." *Id.* 238. Counsel then questioned Payne:

BY MR. MAUSER:

Q (Referred to documents.) Mr. Payne, do you remember being in the courtroom on or about the 8th day of March, 2010, and testifying in a hearing? You may not remember that date, but do you remember testifying here in a hearing involving Mr. Wolverton?

A Did I?

THE COURT: I'm sorry.

THE WITNESS: Yeah.

BY MR. MAUSER:

Q (Referred to document.) You remember -- You remember coming in this courtroom and testifying, and do you remember being asked if you had been riding with Mr. Wolverton for about the last five or six months?

A No, sir.

Q (Referred to document.) You don't remember that? You don't remember answering as to having been riding with him for five to six months and you answering, "Yeah. Yes, ma'am"? You don't

remember answering--

A I rode with Angel one time, and that's how I found out about the pills.

Q You rode with Angel--You rode with Angel only one time and never road (sic) with--

A Yeah. Davis wasn't there, no.

Q And you don't remember testifying to that? You didn't testify that way in this courtroom?

A No, sir.

App. 239-40.

Mr. Grindo, counsel of the co-defendant Davis Wolverton on recross-examination then engaged in the following exchange with Payne:

Q And after listening to me and Mr. Mauser go through your prior testimony -- sworn testimony, prior statements to police, and the difference between your testimony and what you have previously signed in a statement and previously testified under oath, do you wish to take back any of those statements you've made today?

A No, sir.

Q So you've either lied under oath here today, or you've lied under oath before. Which is it?

A I -- I didn't mean to lie. It just must have been a misunderstanding last time.

Q Riding with someone everyday for a five to six month period to Beckley is a misunderstanding--

A No, not everyday. No, I never --

Q Okay.

A I wouldn't say everyday.

Q So you did ride with him. Yes or no?

A He got take-home, so on the --

Q Yes or no.

THE COURT: Answer the question, did you ride with him to Beckley or did you not?

THE WITNESS: No, sir.

THE COURT: You did not.

Id. 247.

During post-trial hearing, the Petitioner's counsel admitted that he had the opportunity to cross-examine Payne about the inconsistent statements, *id.* 504, and the circuit court specifically ruled:

The most troubling issue before the Court is the issue and testimony of Mr. Payne. I believe that it is a question of credibility for the jury in regards to this case. I mean, Mr. Payne did testify inconsistently between proceedings. Counsel had those transcripts available. They brought those issues up before the jury. The jury considered these. The jury was instructed by the Court to consider those in arriving at a decision in this case, and I believe that the evidence--that the testimony of Mr. Payne and his inconsistencies do not warrant the setting aside of this verdict and awarding the defendants a new trial in this case and, accordingly, the motion for a new trial will be denied.

Id. 511-12.

III.

SUMMARY OF ARGUMENT

The Petitioner has failed to prove that there was a violation of her due process rights as she has failed to show that Payne's testimony was actually false, or indisputably false, or conclusively false. All the Petitioner has done is to show that Payne testified inconsistently in two different

proceedings. But, the Petitioner leaps to the conclusion that Payne’s first testimony must be true and his criminal testimony false. Yet, the exact opposite could be true, the civil testimony could be false and the criminal trial testimony true. The decision of whether Payne was “lying then, or lying now” (or lying at all-he did say it may have been a misunderstanding, App. 247), is vested solely and exclusively in the jury.

Additionally, the Petitioner’s counsel was aware of the inconsistent statements. Due process is only offended when the defendant is unaware of the allegedly perjured or false testimony. Where the defendant is aware of such inconsistencies it is counsel’s duty to bring them up before the jury so the jury can knowingly and intelligently exercise its duties. Counsel here was aware of the inconsistencies and, frankly, did a very good job of using it to attack Payne’s credibility.

IV.

ARGUMENT

“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.” *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2009). “We review the denial of a motion for a new trial based on the prosecution’s alleged use of perjured testimony under an abuse of discretion standard. We will not disturb the trial court’s ruling on the motion ‘unless there has been an error as a matter of law or a clear and manifest abuse of judicial discretion.’” *United States v. Kaufmann*, 803 F.2d 289, 291 (7th Cir.1986) (quoting *United States v. Nero*, 733 F.2d 1197, 1202 (7th Cir.1984)).

A. The Petitioner has failed to show that Payne’s prior testimony was indisputably false.

The very first issue under *Franklin* is whether the Prosecutor presented false testimony. Thus, at the outset, the Petitioner must prove the testimony was in fact false. There must be “proof that . . . the State’s evidence was actually false[,]” *State v. Brown*, 210 W. Va. 14, 27, 552 S.E.2d 390, 403 (2001) (per curiam), or ““indisputably false[.]”” *Hicks v. Ballard*, No. 2:08-CV-01365, 2010 WL 6230434, at *10 (S.D. W. Va. Nov. 15, 2010) (quoting *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000)(citations omitted))(Magistrate Judge’s Proposed Finding and Recommendation), *adopted by District Court*, 2011 WL 1043459, at *1 (S.D. W. Va. Mar. 18, 2011), or the statements must be “conclusively show[n] . . . [to be] actually false.” *Maharaj v. Sec’y for Dep’t of Corr.*, 432 F.3d 1292, 1313 (11th Cir. 2005).

The Petitioner has not shown Payne testified falsely *in this case*. While Payne may have testified in the civil case under oath opposite to what he testified to under oath in the criminal trial, this does not establish that the prior testimony was true and the latter a lie. Due process prohibits the State from putting on a witness in a criminal case the State knows is lying. Due process does not prohibit it from putting a witness on the stand who may be characterized as a liar in general. “[E]ven the most dastardly scoundrels, cheats, and liars are generally competent to testify[,]” *United States v. Zizzo*, 120 F.3d 1338, 1347 (7th Cir. 1997), for, “[a]fter all, ‘even a liar tells the truth once in a while.’” *United States v. Robinson*, 437 Fed. Appx. 733, 735 (10th Cir. 2011)(citation omitted).

Accepting the Petitioner’s claim at face value, all the evidence in the criminal case did was to show that the Petitioner was a liar, for as the Petitioner’s counsel, Payne could have been lying at the civil case, or could be lying in the criminal case. App. 247. But the Petitioner has failed to

show that Payne’s testimony in the *criminal* trial was indisputably false, *Brinkley v. Houk*, No. EDCV 08–320–GHK (MAN), 2011 WL 6029941, at * 68 (N.D. Ohio Nov. 21, 2011) (“Violation of the right to a fair trial may occur where the prosecution knowingly and deliberately introduces or uses false evidence and perjured testimony at trial”); *United States v. Battle*, 264 F. Supp.2d 1088, 1208 (N.D. Ga. 2003) (“Defendant has not shown that Brookshire’s statements at trial were false”), because Payne’s testimony in the *civil* case may be the lie. See *United States v. Hemmer*, 729 F.2d 10, 17 (1st Cir. 1984) (“Defendants’ characterization of Lovasco’s grand jury testimony as perjurious necessarily invites the converse conclusion—that her trial testimony was truthful. But this does not follow any more than that Lovasco’s testimony at trial was untrue merely because it was at variance with her grand jury testimony. . . .”). “Presentation of a witness who recants or contradicts his prior testimony is not to be confused with eliciting perjury.” *United States v. Holladay*, 566 F.2d 1018, 1019 (5th Cir. 1978). “Mere inconsistencies in testimony by government witnesses do not establish the government’s knowing use of false testimony.” *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987). See also *Hemmer*, 729 F.2d at 17 (“Simply because there existed inconsistencies between Lovasco’s grand jury and trial testimony does not warrant the inference that the government knowingly introduced perjurious testimony.”).

The circuit court should be affirmed.

B. Because the Petitioner was aware if the allegedly false testimony and was allowed to meet it at trial, the Petitioner has shown no due process violation.

The Petitioner cites to *Napue v. Illinois*, 360 U.S. 264 (1959) to support her claim. Pet’r’s Br. at 10. In *Napue*, Napue was on trial for murder and the State’s principal state witness, then serving a 199-year sentence for the same murder, testified responding to an Assistant State’s

Attorney's question that the witness had received no promise of consideration in return for his testimony. *Id.* at 265. In fact, the ASA promised him consideration, but did nothing to correct the witness' false testimony. *Id.* The Court held that due process would not allow the conviction to stand since "the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States." *Id.* However, in *Napue* the jury was not appraised of the false testimony and that was the critical point, the jury was ignorant of the false statement and, therefore, skewed the jury's truth finding function. *See id.* at 269 ("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."). In *United States v. Agurs*, 427 U.S. 97, 103 (1976) the Supreme Court explained that false or perjured testimony cases, as exemplified by *Mooney v. Holohan*, 294 U.S. 103 (1935), are a subset of the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and "involve[] the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense." As the Oklahoma Court of Criminal Appeals has observed, a false evidence or suppressed evidence claim requires as an element of a due process violation that a key part of the State's case was "presented at trial with an element affecting its credibility intentionally concealed" and, thereby, "[t]he trier of fact was unable properly to evaluate the case against the defendant as a result of the concealment." *Runnels v. State*, 562 P.2d 932, 936 (Okl. Ct. Cr. App. 1977). "[T]he usual scenario where the government is aware of the perjured testimony and allows the defense to remain in ignorance[.]" *United States v. Boyd*, 833 F. Supp. 1277, 1345 (N.D. Ill. 1993). In sum, the problem is that the jury function is compromised. Here, though, the jury was not ignorant—the defense was

aware of the prior testimony and actually brought the prior testimony to the jury's attention.

“This is not a case of suppression of evidence by the prosecution, when the defendant and his counsel are unaware of the existence of that evidence. This differentiates *Napue v. Illinois*, (1959) 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed.2d 1217, and similar cases.” *Sanassarian v. California*, 439 F.2d 703, 703-04 (9th Cir. 1971). “In *Napue* . . . the prosecutor did nothing to correct the false testimony and the false testimony was unknown to the defendant at the time of the trial. Here the defendant knew of the false testimony Under these circumstances there has not been a denial of due process of law.” *People v. Nash*, 222 N.E.2d 473, 478 (Ill. 1966). See also *Bruce v. United States*, 617 A.2d 986, 993 (D.C. 1992) (explaining the outcome in *Napue* was generated by the fact that “prosecutor knew that the evidence was false, but the judge and defense counsel did not. Because only the prosecutor was aware of the deception, it was his obligation, and only his, to disclose it.”). “In cases granting new trials based on the prosecution’s knowing failure to correct perjury, the witness lied on the stand about highly material matters that remained unexplored during cross-examination; there is no question that the jury was entirely in the dark about the witness’ mendacity.” *United States v. Cromitie*, No. 09-Cr-558, 2011 WL 1842219, at * 26 (S.D.N.Y. May 10, 2011) (citing *Napue*, 360 U.S. at 265, 270). Due process—even in perjured testimony cases—is measured only in its effect on the fairness of the trial. *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982). False evidence claims are not meant to punish the prosecution for a witness’s misdeeds, “but to ensure [the] jury is not misled by falsehoods.” *Woodall v. United States*, 842 A.2d 690, 697 (D.C. 2004) (citing *United States v. Meinster*, 619 F.2d 1041, 1044 (4th Cir.1980)). Indeed, it is upon this very point that the New York Court of General Sessions distinguished *People v. Savvides*, 136 N.E.2d 853 (N.Y. 1956), concluding that “so long as the facts become known to the jury, the

source of divulgence, thereupon, becomes, in my opinion, immaterial.” *People v. Pettigrew*, 226 N.Y.S.2d 500, 502 (Gen. Sess.1962). *See also Everitt v. United States*, 353 F.2d 532, 533 (5th Cir. 1965) (“here the basic facts were testified to on trial. The court had before it the knowledge that the witness Domaingue had been immune from prosecution. This same distinguishing characteristic differentiates this case from *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed.2d 1217 (1959).”). Where a defendant is *aware* of perjured testimony, the burden is on the defendant to bring such information forward to the fact finder using the traditional tools of impeachment and cross-examination.

An oft-cited Seventh Circuit case states:

“the fact that the alleged statement was known to petitioner and his counsel during the trial compelled petitioner to raise this issue then or not at all. When a criminal defendant, during his trial, has reason to believe that perjured testimony was employed by the prosecution, he must impeach the testimony at the trial, and ‘cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding.’” *Evans v. United States*, 408 F.2d 369, 370 (7th Cir.1969) (quoting *Green v. United States*, 256 F.2d 483, 484 (1st Cir.1958)).

Beltran v. Cockrell, 294 F.3d 730, 736 (5th Cir. 2002). *See also Ross v. State*, 377 N.E.2d 634, 636 (Ind. 1978) (“One who has been convicted of a crime may not later contend that he has been denied a fair trial because of false testimony of a government witness, if it appears that he knew at trial that the testimony was false but, nonetheless, made no attempt to demonstrate its falsity by cross-examination, by his own testimony, or by offering rebuttal witnesses who were readily available.”). Thus, “[w]here evidence refuting a false statement is revealed in cross-examination, the government cannot be said to have relied on the false direct-examination testimony to obtain a guilty verdict.” *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir.2006). *See also People v. Nash*, 222

N.E.2d 473, 478 (Ill. 1966) (holding that because the defendant knew of the false testimony concerning the lack of any leniency and evidence was presented to show that promises of leniency had in fact been made there was no denial of due process of law); *United States v. Zichettello*, 208 F.3d 72, 102 (2d Cir. 2000) (citations omitted) (“Appellants knew of the purported discrepancy in Montoro’s testimony and the evidence offered in support of that testimony. They argued to the jury that their version of when the bribes actually occurred was correct. The jury was thus aware of the dispute and obviously believed Montoro. Appellants having had ‘ample opportunity to rebut [Montoro’s] testimony and undermine his credibility,’ we will not supplant the jury as the ‘appropriate arbiter of the truth’ and ‘sift [] falsehoods from facts[.]’”).

“It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony is conflicting[.]” Syl. Pt. 3, *Long v. Weirton*, 158 W. Va. 741, 214 S.E.2d 832 (1975), and such a duty extends to deciding exactly when a single witness is telling the truth when the witness has given contradictory testimony in the same case. “‘When a witness, during the course of his testimony, makes two contradictory statements, it is within the province of the jury to accept and rely on either version and to disregard the other, in part or in toto. If a witness’s testimony on direct examination conflicts with that given by him on cross-examination, it is for the jury to decide when, if at all, he testified truthfully.’ It is the province of the jury to weigh evidence and resolve inconsistencies in testimony.” *Graham v. Wallace*, 208 W. Va. 139, 141, 538 S.E.2d 730, 732 (2000) (per curiam) (quoting 81 Am. Jur.2d *Witnesses* § 1032 at 844 (1992) (footnotes omitted)). Indeed, a “fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’” *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (plurality opinion) (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)) (emphasis deleted). “No matter how

impaired [a witness's] evidence, the jury had the right to believe all or so much of it as they thought proper." *United States v. Luciano*, 343 F.2d 172, 173 (4th Cir. 1965). Here, Payne was impeached with the evidence so the jury function was *not* compromised. The Petitioner "was fairly tried by a jury of her peers who heard all of the relevant evidence." *State v. Stewart*, 719 S.E.2d 876, 901 (W. Va. 2011) (Benjamin, J., dissenting). That is what she was entitled to and that is what she received.

The circuit court should be affirmed.

V.

CONCLUSION

The circuit court should be affirmed.

Respectfully submitted,

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Respondent,

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CERTIFICATE OF SERVICE

I, SCOTTE E. JOHNSON, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the “*STATE’S BRIEF*” upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 28 day of March, 2012, addressed as follows:

To: Bernard R. Mauser, Esq.
P.O. Box 155
Sutton, WV 26601



SCOTT E. JOHNSON