



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 11-1766

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

VS.

HENRY B. HARRIS,

Defendant Below, Petitioner.

Appeal from a final order
of the Circuit Court of Hancock
County (02-F-48)

PETITIONER'S BRIEF

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III. ASSIGNMENTS OF ERROR

The Circuit Court of Hancock County erred by improperly permitting the state to introduce evidence pertaining to the Petitioner's prior, extraneous bad acts, otherwise prohibited by Rule 404(b) of the West Virginia Rules of Evidence, without, first, conducting a hearing, as recommended by the holding set forth in Syllabus Point 2 of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), to determine the admissibility of the same; or providing the jury a curative instruction, once it came in for their consideration.

IV. STATEMENT OF CASE

The matter at bar came before the Circuit Court of Hancock County, West Virginia, pursuant to a seven (7) count direct indictment, charging the Petitioner, Henry B. Harris, primarily¹, with "Sexual Assault in the First Degree" involving four (4) separate female victims, who, as alleged by the State of West Virginia ("state"), were minors at the time of the incidents. (A.R.1). The local sheriff issued a warrant upon the Petitioner in the State of New Mexico, where he resided at that time, in a nursing home facility, and, following a waiver of extradition, he was transported to the jurisdiction of the circuit court to answer for said charges. (A.R. 301 – 305).

Following issues relating to the impartiality² of the lower tribunal, this Court, on July 2, 2002, issued an "Administrative Order" disqualifying the presiding judge hearing the matter, and assigning another judge within the circuit to the case. (A.R. 88).

¹ Counts 1 through 5 and Count 7 charged the Petitioner with "Sexual Assault in the First Degree," while the remaining charge, Count 6, alleged "Crimes Against Nature."

² At its core, the state alleged that the presiding judge issued an Order releasing the petitioner from incarceration, placing him instead on unsupervised house arrest, following an *ex parte* exchange with a third party. This Court stayed said Order, prohibiting his release. *See A.R.* pp. ____

On August 16, 2002, the Petitioner moved to sever the charges underlying the indictment and, further, requested the state elect which offenses should proceed to trial first. (A.R. 89). During pretrial proceeding held August 18, 2002, the state indicated that it was not opposed to such a motion and, thereafter, elected to try Counts 6 and 7 first. (A.R. 92, 99).

On October 31, 2002, a petit jury acquitted the Petitioner as to Count 7³ of the underlying indictment. (A.R. 123).

On November 13, 2002, the matter came on for pretrial proceedings; particularly with regard to the upcoming trial, relating to Counts 1, 2, and 3 of the indictment, which, at that time, was set for November 15, 2002. (A.R. 310 – 340) At the time, the Petitioner’s counsel filed “Defendant’s Motion to Suppress Evidence” and “Defendant’s Motion in Limine,” each of which sought to keep from the jury’s consideration information regarding other sexual assault allegations and/or charges unrelated to Counts 1, 2, and 3 of the indictment. (A.R. 181, 189, 312 – 313, 333 – 336). The motion in limine, insomuch as it dealt solely with the issue of prohibiting evidence of other bad conduct, beyond those offenses charged in the first three charges, was granted without objection by the state. (A.R. 335). As the prosecuting attorney assured the lower tribunal, the witnesses would testify within “the confines of the particular counts of the indictment that’s at trial[.]” (A.R. 334 – 335).

With the exception of the Petitioner’s alleged prior bad conduct, the “Defendant’s Motion to Suppress,” relating to other issues, such as driver’s license history and a separate civil abuse/neglect file, was deferred until a later time. (A.R. 335 – 338). Meanwhile the trial date was continued, pursuant to the state’s motion, to December 6, 2002. (A.R. 328).

³ While the record is not clear on the issue, it appears as though the state, during pretrial proceedings moved to dismiss Count 6. *See* Pretrial Tr., November 13, 2002, p. 17.

There is no record of the lower court conducting a hearing held in accordance with Syllabus Point 2 of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), relating to the admission of Rule 404(b) evidence.⁴

On December 6, 2002, the matter came on for trial as to Counts, 1, 2 and 3 of the indictment. During pretrial proceedings, held first thing that morning, the parties agreed to incorporate Count 3 of the indictment into Count 2;⁵ thus, making for a trial on two (2) charges of “Sexual Assault in the First Degree.” (A.R. 345 – 347).

During the trial, the state called its chief complaining witness, M.R.W.,⁶ who testified to being sexually assaulted by the Petitioner in the early 1980’s when he baby-sat her. (A.R. 380 – 383).

During her direct examination by the state, Ms. W. was asked by the prosecuting attorney, first, how many times the Petitioner assaulted her; then, whether the number of incidents amounted to ten (10), to which she responded “more than ten; a dozen.” (A.R. 383). During re-direct examination by the state, Ms. W. was, again, asked by the prosecuting attorney directly whether the incidents at issue surpassed a certain baseline, being, first, “once;” then whether it occurred “more than twice,” to which she responded in the affirmative. (A.R. 402 – 403).

The trial court failed to offer a limiting instruction as to introduction of such evidence, as recommended by the Court pursuant to Syllabus Point 2 of the *McGinnis* decision; moreover,

⁴ Of course, given the fact that the state, essentially, agreed to not seek admission of 404(b), “other bad acts,” evidence, there would appear no need for a hearing.

⁵ Inasmuch as the dates encompassing Count 2 had an end date of December 31, 1984, while Count 3 had an end date of January 1, 1985, Count 2 was to be amended, adding just one (1) more day, to incorporate Count 3.

⁶ Consistent with general guidance from this Court, *see, e.g. State v. Shrewsbury*, fn.1, 213 W.Va. 327, 582 S.E.2d 774 (2003), and mindful of the fact that the instant Petition is a publicly filed document, Petitioner has utilized only the victims’ initials in this document. Their full names are reflected in the trial transcripts, as well as the indictment.

looking at the charge presented to the jury, they were permitted, as well as reminded, to consider, offenses beyond that which was originally charged in the indictment. (*Compare* A.R. 257 – 258 with A.R. 1). Instead of determining whether the Petitioner had “sexual intrusion” or “sexual intercourse” with M.R.W. on the two (2) occasions charged by the indictment, the charge indicated that such conduct occurred at “various times.” *Id.*

Ultimately, the jury returned a “Guilty” verdict against the Petitioner as to Count 1 and Count 2 of the Indictment, each charging “Sexual Assault in the First Degree.” (A.R. 261, 263).

On December 18, 2002, the matter came before the circuit court for sentencing. During sentencing, the tribunal did express its dissatisfaction with penalties allowed by statute given the time frame in which the incidents occurred, and did, thereafter, impose the maximum penalty allowed. The court sentenced the Petitioner “to serve not less than ten (10) nor more than twenty (20) years in the West Virginia State Penitentiary system” and fined him Ten Thousand Dollars (\$10,000.00) fine as to Count 1 of the indictment, and “not less than ten (10) nor more than twenty (20) years in the . . . [p]enitentiary system,” with a Ten Thousand Dollar (\$10,000.00) fine, as to Count 2 of the indictment. (A.R. 273). The court ordered that the sentences imposed run consecutive to each other for a net effective sentence of not less than twenty (20) nor more than forty (40) years in the penitentiary, plus a Twenty Thousand Dollar (\$20,000.00) fine. *Id.*

On or about January 7, 2003, the state served upon the Petitioner its motion to Nolle Prosequi the remaining offenses, effectively dismissing any and all remaining charges against the Petitioner. (A.R. 271).

On March 24, 2003, the lower court appointed new counsel to represent the Petitioner in these proceedings. (A.R. 279). He was resentenced by Order entered May 12, 2003, (A.R. 283), then resentenced again on November 12, 2003. (A.R. 285).

On February 24, 2004, the circuit court, once again, resentenced the Petitioner, extending his time for appeal; (A.R. 291), less than two (2) months later, the court appointed new counsel. (A.R. 294).

By Agreed Resentencing Order, entered in this matter April 8, 2011, the circuit court appointed present counsel to prosecute this appeal. (A.R. 295). By agreement of the parties, during a hearing on this matter October 26, 2011, the circuit court resentenced the Petitioner for purposes of timely perfecting this appeal. (A.R. 297).

V. SUMMARY OF ARGUMENT

The lower court erred by improperly permitting the state to introduce evidence pertaining to the Petitioner's prior, extraneous bad acts, prohibited by, both, a prior order the court as well as Rule 404(b) of the West Virginia Rules of Evidence. The evidence was, nevertheless, admitted without, first, conducting a hearing, as recommended by the holding set forth in Syllabus Point 2 of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), to determine the admissibility of the same; or providing the jury a curative instruction, once it came into evidence for their consideration.

VI. STATEMENT REGARDING ORAL ARGUMENT & DECISION

Pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, the Petitioner submits that the facts and legal arguments in the present matter are adequately presented; thus, making the decisional process of the Court achievable without the aid of oral argument.

Nevertheless, should the Court find it necessary, this case is appropriate for oral argument pursuant to Rule 20(a) of the West Virginia Rules of Appellate Procedure, and disposition by memorandum decision.

VII. ARGUMENT

Rule 404(b) of the West Virginia Rules of Evidence provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

As examined by this Court in *State v. McGinnis*, 193 W.Va. 147, 153 – 154, 455 S.E.2d 516, 522 - 523 (1994), the first sentence is just a restatement of Rule 404(a) of the West Virginia Rules of Evidence; while the second sentence “expressly permits the introduction of specific acts in the nature of crimes, wrongs, or acts to prove purposes other than character”

Continuing to move forward, the rule states that, if it is the prosecution’s intent to admit “bad conduct” evidence, the defendant must be notified in advance of trial, or good cause must be shown for the trial court to excuse the lack of said notice. Rule 404(b), W. Va. R. Evid.

Going back to the Court’s decision in *McGinnis*, in order for the prosecution to admit into evidence prior bad conduct of a defendant, including prior crimes, there should be an in camera hearing, outside the presence of the jury, to determine, first, whether by a preponderance of the evidence the acts were committed by the defendant; whether such evidence is relevant under Rule 401 and 402 of the West Virginia Rules of Evidence, meanwhile, conducting the balancing test required under Rule 403. Syl. Pt. 2, *McGinnis*.

Finally, and if a court is satisfied that 404(b) is admissible, there should be an instruction offered to the jury, explaining to them the limited purpose for which they hear the same. *Id.*

As seen in the facts, none of that occurred in the matter *sub judice*. During the November 13, 2002 pretrial hearing, the trial court considered the Petitioner’s motion, which, at its core,

sought to suppress 404(b) - type evidence. (A.R. 312 – 313, 333 – 336). During discussions regarding the motion, the state acquiesced to the Petitioner’s motion and assured the tribunal that the witnesses would testify within “the confines of the particular counts of the indictment that’s at trial[.]” (A.R. 334 – 335). Based upon the same, the trial court granted the Petitioner’s motion. (A.R. 335).

Nevertheless, during the December 6, 2002 trial, the subject of which were Counts 1 and 2 of the underlying indictment, or merely two (2) criminal offenses, the state purposely elicited from its chief complaining witness, M.R.W., that she had been sexually assaulted by the Petitioner well beyond the incidents charged; going so far as to specifically ask her if there had been “more than ten” (10) such occasions, to which the Ms. W. responded “more than ten; a dozen.” (A.R. 383). Then, later, during re-direct examination, the state, again, exceeded the threshold set by Rule 404(b) by asking M.R.W. whether the incidents at issue, which number only two (2), occurred “more than twice,” which said witness affirmed. (A.R. 403).

To add insult to the injury, the jury was, later, reminded that the Petitioner’s conduct alleged in the two (2) counts of the indictment went well beyond that number, given the charge instructed them, in order to overcome the presumption of the Petitioner’s innocence and find guilt upon him, that he, “in Hancock County, West Virginia, from on or about the first day of January, 1982, through December 5, 1983, *at various times*, did engage in sexual intercourse and sexual intrusion with another person . . . [M.R.W.], she then being eleven years old or less and . . . [he] then being fourteen years old or more.” (A.R. 257 – 258, 496 – 497). Emphasis added.

The same instruction was given with regard to Count 2 of the indictment, with the exception of the date being “from on or about the sixth day of December, 1982[,] through December 31, 1984;” that is to say instead of determining whether the Petitioner had “sexual

intrusion” or “sexual intercourse” with M.R.W. on one (1) occasion during that time period, the jury could consider “various times.” *Id.*

Under Rule 404 of the West Virginia Rules of Evidence the introduction of such “various” occurrences of sexual assault, beyond the two (2) offenses charged in the indictment, was not permissible, unless there was, first, advance notice by the state, indicating its intention to present the same, or cause to show why no notice was necessary; and, second, a hearing by the lower tribunal to determine admissibility of such evidence. *See generally McGinnis; see also* Rule 404(b), W. Va. R. Evid. Neither instance occurred in the present matter.

Moreover, the trial court failed to offer a limiting instruction in an attempt to cure the defect; or, even, direct the members of the panel to completely disregard that portion of the evidence.

Insomuch as the state’s conduct in this matter led to the improper admission of evidence relating to collateral crimes, eight (8) to ten (10) more crimes to be exact, and the trial court made no effort to cure the defect that resulted same, by limiting instruction or otherwise, such is tantamount to reversible error. *See McGinnis*, 193 W.Va. at 153, 455 S.E.2d at 522 *citing State v. Simmons*, 175 W.Va. 656, 658, 337 S.E.2d 314, 316 (1985) (“[t]he improper admission of evidence relating to collateral crimes has generally been held to constitute reversible error.”).

VIII. CONCLUSION

The circuit court committed error by admitting other crimes, wrongs and acts evidence. For these reasons and any others which may be apparent to this Court, your Petitioner, Henry B. Harris, respectfully prays that his Petition be granted, that this Court enter an Order granting him leave to appeal the underlying sentence, and for such other relief as this Court deems just and proper.

Respectfully Submitted,

HENRY B. HARRIS

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IX. CERTIFICATE OF SERVICE

I, Brent A. Clyburn, Esq., counsel for Henry B. Harris, certify that I have served the attached PETITIONER'S BRIEF upon the State of West Virginia by forwarding a true and accurate copy thereof by United States Postal Service, postage pre-paid, to the Office of the Attorney General, Thomas W. Rodd, AAG, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301 on the 9th day of March, 2012



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