

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPREME COURT NO: 12-0829

BRANDON FLACK

PETITIONER/APPELLANT

v.

STATE OF WEST VIRGINIA,

RESPONDENT/APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
MERCER COUNTY, WEST VIRGINIA**

(11-F-288)

REPLY BRIEF OF APPELLANT

ORAL PRESENTATION REQUESTED

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ARGUMENT

I. Caudill Instruction

In its response, the State asserts that Appellant's argument as to error resulting from the lack of a Caudill instruction are without merit. Appellant asserts that available authority makes clear that the obligation of the court *sua sponte* to provide a Caudill instruction has not been definitely addressed by the Court, but suggest such an obligation. In the alternative, plain error analysis requires examination of facts and circumstances on a case by case basis, and in the instant matter, merits a finding of plain error.

The applicability of the *sua sponte* obligation may be seen in the decision in State v. Collins, 186 W.Va. 1, 409 S.E.2d 181 (1991). In Collins, the court considered the requirement of a limiting instruction relating to the impeachment of a witness by way of a prior consistent statement under Rule 607 of the West Virginia Rules of Evidence. The court recognized that "the trial court has an obligation to instruct the jury that impeaching testimony may only be considered as bearing on the witness's credibility and not as substantive evidence." 186 W.Va. at 9-10,

409 S.E.2d at 189-190. The Collins court then recognized, "we adopted this rule in an analogous situation in syllabus point 3 of State v. Caudill." [citation omitted]

In discussing the necessary instruction, the Collins court recognized the division among jurisdictions as to whether the instruction in question must be given *sua sponte*. However, the court made clear that in West Virginia the requirement was in place. "Several courts have agreed with our position that such an instruction should be given by the trial court even in the absence of a request". 186 W.Va. at 10, 409 S.E.2d at 190

The Collins court then acknowledged the potential application of the plain error doctrine, and provided an analysis of the facts of its case under plain error, ultimately finding that the plain error requirements would be satisfied in that case. However, in closing, the court again made clear that the rule in West Virginia courts required *sua sponte* instruction. "Even if we did not have a *sua sponte* rule, we conclude that the trial court committed plain error by not giving a cautionary instruction to the jury." 186 W.Va. at 11, 409 S.E.2d at 191. [Emphasis Added]

The State cites State Ex. Rel. Franklin V. McBride, 226 W.Va. 375, 701 S.E.2d 97 (2009) for the proposition that the law in West Virginia does

not require the trial judge to *sua sponte* give a cautionary instruction on an accomplice's testimony," and that "a defendant must request such an instruction." The issue in McBride differs from that presented in the case at bar. Most significantly, the court in McBride determined that it was not presented with issues of accomplice testimony. Additionally, insofar as those issues potentially existed, they were issues relating to the instructions called for under State v. Humphreys, 128 W.Va. 370, 36 S.E.2d 469 (1945). The instruction called for in Humphreys is one instructing the jury that conviction for a crime may be had up on uncorroborated testimony of an accomplice, but that such testimony should be received with caution.

Specifically, syllabus point 1 of Humphreys closes with noting that the jury should "upon request" be so instructed. Therefore, the court was absolutely correct in stating in footnote 14 of the McBride decision that no duty exists for the court to *sua sponte* give such instruction. It is noteworthy as well that the full passage contained in footnote 14 specifically notes that "the decision in Humphreys does not mandate the trial judge *sua sponte* give a cautionary instruction on accomplice testimony."

By its very specific language, the McBride decision specifically addressed the requirements of Humphreys. Therefore, the analysis and rulings in McBride cannot be asserted to set forth a broad rule as to the trial court's obligation with reference to all potential instructions relating to the accomplice testimony.

The State offers the 2010 case of State ex rel Kitchen v. Painter, 226 W.Va. 278, 700 S.E.2d 489 (2010), as supportive of its position in that "this Court's opinion... did not suggest that the Circuit Court's failure to *sua sponte* give a Caudill type limiting/cautionary instruction was reversible error." Examination of the Kitchen decision promptly reveals itself as having no application to the case at bar. Specifically, the court found that despite the appellant's attempt to craft an argument around Caudill, that case had no application.

"Mr. Mosley's testimony is not governed by syllabus point 3 of State v. Caudill, but rather by Rules of Evidence 404 (b) and this Court's jurisprudence construing that rule.... therefore, having found that syllabus point 3 of State v. Caudill does not apply to the facts of this case, we find no merit to the appellant's argument that Mr. Mosley's testimony that he pled guilty to marijuana cultivation was improper.

226 W.Va. at 294, 700 S.E.2d at 505.

The State's reference to State v. Cabalceta, 174 W.Va. 240, 324 S.E.2d 383 (1984), is likewise curious. The Court in that case found that the appeal was not merited, in large part because the court had, in fact, given an instruction *sua sponte*, which significantly addressed the Caudill issue.

The State also cites recent decisions of this Court in State v. Scarbro, 229 W.Va. 164, 727 S.E.2d 840 (2012), and State v. Barnett, 226 W.Va. 422, 701 S.E.2d 480 (2010). As noted in appellant's initial brief, the court in both Scarbro and Barnett found it unnecessary to address the applicability of plain error to the lack of a Caudill instruction, because both cases were clearly reversible on other grounds. In both decisions, this Court explicitly stated that it was unnecessary to address the issue of the applicability of plain error and that it was not going to undertake to address that issue within those decisions. Appellant submits that those decisions can be seen to stand for nothing more, and that the Court's inaction in those cases cannot be construed as a tacit endorsement of either position.

The State asserts that the role and obligation of the trial court with reference to the Caudill instruction is in some fashion settled. Clearly, it is not.

II. Fair Cross Section

The State attacks appellants' fair cross-section arguments at the issue of whether appellant has shown a systematic exclusion of African-American jurors, or jurors of the particular classification.

In its brief, the State asserts the decision of the United States Supreme Court in Berhuis v. Smith, 130 S.Ct. 1382, 559 U.S. 314 (2010), specifically thwarts appellant's arguments as the systematic exclusion, and renders appellants discussion of Duren v. Missouri, [citation omitted] "simply irrelevant." The State paints Berhuis, with too broad a brush. The passages from Berhuis, referred to by the State indicate the lack of "clearly established" precedent, or the fact the Court had never "clearly established" that jury selection features such as those discussed could give rise to a fair cross section claim.

The Court in Berhuis was dealing with a petition for habeas corpus relief under 28 U.S.C. § 2254. The petitioner in Berhuis was therefore

entitled to relief only if he established that the lower courts had made an unreasonable application of "clearly established Federal law, as determined by the United States Supreme Court." Thus the Court's continued reference to matters which were not "clearly established". This analysis is far from a definitive determination on the viability of claims systematic exclusion such as presented by appellant.

The State would cast appellant's arguments simply in terms of the individual choices of jurors to not appear for service, and the impossibility of the actions of those not in charge of the system creating a systematic exclusion. However, the position assumed by the State oversimplifies the issue. The disparity which is exhibited by the data is the result of a not only of, perhaps personal decisions made by potential jurors not to honor the directive and their legal obligation, but also of the decision of the circuit clerk, and the court, which the clerk serves, to decline to enforce the summons and directives, in explicit contradiction to statutory commands.

Arguably, it should be enough in and of itself that the clerk, and court, did not, and do not as a routine practice, comply with clear, and mandatory statutory commands as to the manner in which the jury is to be selected, gathered and impaneled. However, when these failures are

combined with data that clearly indicates that the number of African-American jurors is significantly below the representative population in the jurisdiction, the systematic impact cannot be disputed.

III. Testimony of Medical Examiner

The State addresses appellant's assertion of error regarding the testimony of the medical examiner by reference to this court's decision in State v. Jackson, 171 W.Va. 329, 298 S.E.2d 866 (1982). However, Jackson sets forth principles which do not survive the rediscovery of the Confrontation Clause of the Sixth Amendment of the United States Constitution, and Section 14 of Article III of the West Virginia Constitution, as recognized in State v. Kennedy, 229 W.Va. 756, 735 S.E.2d 905 (2012).

As set forth at length in appellant's initial brief, testimony of the type which would clearly have been authorized under Jackson, has been recognized to be violative of confrontation principles by inappropriately allowing for surrogate testimony.

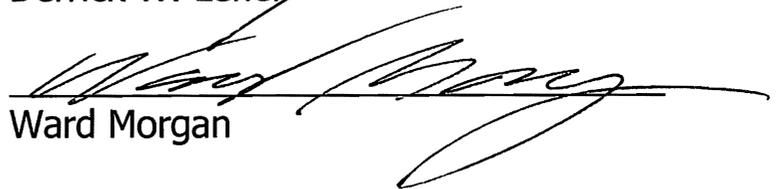
CONCLUSION

For the reasons set forth herein, Appellant respectfully requests, for the reasons stated herein that his appeal be granted and requests the verdict previously entered be set aside and that he be granted a new trial.

BRANDON FLACK,
By Counsel,



Derrick W. Lefler

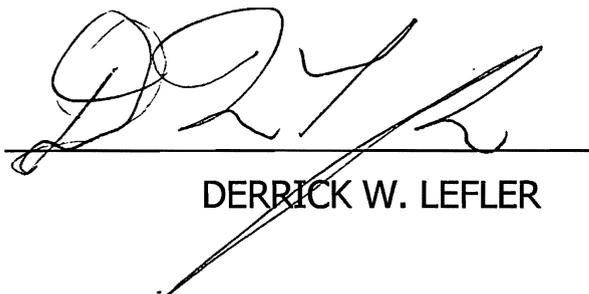


Ward Morgan

CERTIFICATE OF SERVICE

I, Derrick W. Lefler, counsel for Appellant, do hereby certify that I have served a true copy of the foregoing Brief of Appellant to the Supreme Court of Appeals of Southern West Virginia, via Federal Express Mail Services, addressed to said counsel as follows, on this the 12th day of April, 2013:

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