

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

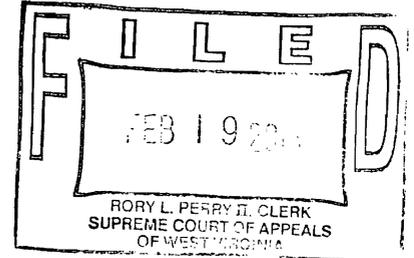
STATE OF WEST VIRGINIA,

Respondent,

vs.

NICHOLAS RYAN ROBEY,

Petitioner.



NO. 12-1413

(Below: Harrison Co. No. 10-F-122-3),

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The lower Court abused its discretion and committed harmful constitutional error by sentencing Petitioner to a sentence disproportionate to his co-defendants without supporting findings of fact.

STATEMENT OF THE CASE

Procedurally

This criminal matter arises from a conviction of one count of a larceny-motivated "home-invasion" felony murder participated in by the Petitioner when he was Eighteen (18) Years Old. Petitioner was indicted (along with his three co-defendants) during the May 2010 Term of the Harrison County Grand Jury (A04-05). Count Ten of the Indictment charged the petitioner with the offense of Felony Murder. Count Eleven charged Petitioner with Conspiracy To Commit Burglary. Count Twelve charged him with Grand Larceny.

Petitioner's counsel below entered into plea negotiations with the State, and achieved a plea agreement that included a sentencing recommendation by the State that the State would join with the petitioner in requesting that the Court make a "recommendation of mercy" at sentencing (A07, Paragraph No. 3).

Petitioner was subsequently convicted by a guilty plea before the Honorable James A. Matish, Judge of the Circuit Court of Harrison County, West Virginia, in Felony No.: 10-F-122-3, which plea hearing occurred on August 5, 2010. The sentencing was deferred until the petitioner had completed a "sixty-day diagnostic evaluation" at Anthony Correctional Center. The petitioner was sentenced on August 2, 2011. The

State fulfilled its agreement to ask the Trial Court for a recommendation of eligibility for parole.

The final Order of the Circuit Court sentencing the Petitioner was entered on August 5, 2011. Despite the joint recommendation of the parties, the Petitioner was sentenced to life in prison without recommendation of consideration for parole, i.e., "without mercy," and that the petitioner make his proportionate ¼ share of restitution to the victim's estate of \$860.00 for funeral expenses, jointly and severally with his three co-defendants. Each of the co-defendants, also convicted of felony murder, received a recommendation for consideration for parole from the Trial Court.

Presumably due to the letter of the petitioner to the Court dated October 6, 2011 (A148), the undersigned was appointed as appellate counsel on August 22, 2012 (A149), and an "Order Resentencing The Defendant" for appellate purposes was subsequently entered on October 16, 2012 (A151).

Factually

On or about August 13, 2009, the victim in this matter, an Eighty (80) Year Old man, was at his home alone in a rural area of Harrison County, West Virginia. On or about that date, the petitioner and all of his co-defendants (being his older brother, Christopher Scott Robey, Joshua Chance Morgan, and Megan Rachele Jones aka Titus were together in a vehicle, the co-defendants having picked up the Eighteen (18) Year Old petitioner, who had been told they were going to Megan Jones' residence to "hang out" (A54). After Petitioner got into the vehicle, however, Megan Jones expressed the idea that they should rob the victim's residence for guns that she knew

he had, and sell those guns. Petitioner had a G.E.D, was of "Above Average" intelligence (A59), no history of mental illness (A57), had been employed at the time of the offense for 6 months through a temporary agency working for Waste Management (A12, A57), and reported not having a substance abuse addiction, stating during his diagnostic interview a history of weekly marijuana use, and that he was not under the influence on the night of the crime (A57). He also reported that he had been a paramour of Megan Jones in the past (A56). The petitioners brother and co-defendant, Christopher Robey, was the paramour of Megan Jones at the time of the offense, the two having been apprehended together in the San Diego area of California in 2010, some time after the offense) (A30).

The petitioner stated that after Megan came up with the idea and said to do the crime (The assistant prosecuting attorney handling the case stated at the sentencing hearing, "...based upon the totality of the circumstances and the investigation completed, as well as witnesses outside - witnesses' statements outside the co-defendants, Ms. Jones appears to be the one who formulated the plan and who knew - who had been in the house prior, and based upon that, is the one who kind of coerced the others to go to the home and burglarize it." A121). Petitioner's brother Chris told him what his role in the offense would be (A54). Megan Jones had stated that the victim was not home. When they arrived close to the residence, Megan Jones stayed in the vehicle in which she had driven the three male co-defendant's to the scene. (*Id.*, and A125). Petitioner stated that he went to the front door and heard a noise in the house, and then the victim answered the door. *Id.* Petitioner then asked if he could use

the telephone, that his car was broken down. *Id.* During his diagnostic interview, Petitioner continued with the rendition as follows:

"I pretended to use the phone, and unlocked the back door to let in Josh and Chris, Then I talked to Mr. Leeson in the living room, talking to him while Chris and Josh searched the house and got what they could. Then, the only place they had left to search was Mr. Lesson's bedroom and they couldn't get to it without being seen by Mr. Leeson. I asked what they wanted to do, and Chris was holding a bat and said "I'll just kill him." I said I didn't want Mr. Leeson to die so I said "no, I'll do it. knock him out." I figured that I would knock Mr. Leeson out and would get arrested later for robbery because he'd see my face, but figured that was better than murder. So I walked into the living room with the baseball bat down by my side and hit Mr. Leeson. After I hit him the first time, he stood up and so I hit him again and he fell back into his chair, but then he stood up again and so I hit him the third time and he fell back in his chair and didn't get back up. He was breathing pretty heavily, but he was alive. Then Josh and Chris went to Mr. Leeson's bedroom and I stood guard in the door, keeping an eye on Mr. Leeson with a mesh backpack on my back. Josh and Chris got the guns and stuff out of the room and put some stuff into the backpack on my back, including a pistol and some shells. Then I noticed that Mr. Leeson was bleeding pretty badly and we decided to leave. So, I went to the front door and locked the front door and then we went out the back door and I turned the knob on the back door and pulled it closed. When we left, Mr. Leeson was still alive. I didn't think he'd die."
(A54-55).

The diagnostic report also states that pettiioner's account was consistent over the versions that he gave of it (A57), and is consistent with the factual basis Petitioner stated during the plea hearing (A27-28).

The victim's body was not found until August 15, 2009, when law enforcement received a request for a safety check to his residence (A66). The petitioner was later found and arrested in the State of North Carolina on February 2, 2010 (A55, A91). Petitioner was reported to state at the time of his arrest, "You might as well just kill me for what I have done" (A91). He confessed to the offense to detectives present from the

Clarksburg Police Department later that same day (A91-92).

At the petitioner's plea hearing on August 5, 2010, the Trial Court went into express detail regarding all significant issues surrounding the plea, and Petitioner's responses were consistent with the Court's findings on that date regarding the plea being knowingly and intelligently entered into, etc. However, the Trial Court held the acceptance of the plea in abeyance until the sentencing hearing. The pleas were subsequently accepted by Division II of the Circuit Court in the necessary absence of the Trial Court Judge.

The Trial Court Judge held a joint sentencing hearing on August 2, 2011, for all defendants. The prosecutor stated at that sentencing hearing that "Nick Robey... appears to be the most truthful of all four. Mr. Robey has always been forthright with what happened. That was corroborated by the testimony and the statements of other defendants, which would suggest that Chris may have been the one who wanted to kill Mr.[sic Leeson], and therefore Nick volunteered to incapacitate him," and that they did not expect a death to occur (A121). The petitioner's counsel allocuted on his behalf, and the petitioner allocuted on his own behalf as well (A125-126). When the Court announced Petitioner's sentence of no recommendation for parole, the petitioner had an outburst and was removed from the courtroom (A133).

SUMMARY OF ARGUMENT

The petitioner argues that the lower Court departing from the terms of the plea agreement and the joint recommendations of the State and his counsel for a recommendation of eligibility for parole worked an unconstitutionally disparate sentence

upon him from his co-defendants.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Even though this a "life without mercy" case, the Trial Court record to which the appeal is necessarily limited is incredibly sparse (but not technically insufficient by any means), consisting primarily of a plea hearing, a sentencing hearing and documents surrounding the same. The undersigned counsel does not believe that oral argument is necessary or would be beneficial in this matter¹ pursuant to the criteria of Rule 18(a), but of course will appear for the same should the Honorable High Court deem otherwise.

ARGUMENT

It is respectfully asserted that the honorable lower court committed harmful constitutional error in sentencing the defendant disparately in this crime of felony murder, departing from the plea agreement and the joint recommendation of counsel as to all co-defendants that they receive a recommendation for eligibility for parole at sentencing.

The petitioner was 18 years old at the time of the offense, the youngest of all of the co-defendants. His criminal history was limited to a shoplifting and a possession of marijuana less than 1/2 ounce conviction (A55). While he was the defendant who struck the victim causing his fatal injuries, he was not the instigator of the crime nor the one in

¹ Because there was only a plea hearing and a sentencing hearing below, and this appeal is limited to matters of record, the petitioner understands that his greatest hope for relief may be in *omnibus habeas corpus* proceedings, if necessary, where the record may be fully developed from the substantial amount of discovery provided below and the testimony of witnesses in those proceedings, and where issues only appropriate to such proceedings are apparent.

charge at the scene, and all of the evidence indicated that he did not intend to do anything but to "knock out" the victim. The defendant, Megan Jones, who thought of the crime, planned it, delivered the defendants to the home and waited outside in the vehicle received a life sentence with a recommendation for mercy, as did the other two defendants who entered the home with the petitioner. The State not only recommended a recommendation for parole eligibility for the Petitioner at sentencing, but spoke on his behalf (A121). The State did not do that for any of the other defendants specifically at sentencing.

It is true that the plea in this matter was nonbinding upon the Court. However, it is also true that the Court would not accept a binding plea, as is its normal practice.

This high Court has held that:

"Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syllabus point 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). Syl. Pt. 1, *State v. Buck*, 361 S.E.2d 470, 178 W.Va. 505 (W.Va., 1987). The sentence in the instant case certainly does not violate that principle. However, this Court also held in *Buck* that "Disparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as **each codefendant's respective involvement in the criminal transaction** (including who was the prime mover), **prior records,**

rehabilitative potential (including post-arrest conduct, age and maturity), and **lack of remorse**. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone." Syllabus point 2, *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984). Syl. Pt. 2, *State v. Buck*, 361 S.E.2d 470, 178 W.Va. 505 (W.Va., 1987).(Emphasis added).

There is no indication whatsoever that the honorable lower Court in this matter considered the petitioner's prior record, each co-defendant's respective roles in the crime, the presence or absence of remorse, and most significantly in this instance, the rehabilitative potential of the the petitioner. The Court made no such findings or statement at sentencing regarding any such factors except that the petitioner was the one who struck the fatal blows. He had expressed remorse throughout. He was clerly not a decision-maker in the crime, deferring to his bother and Megan Jones. His shoplifting and simple possession of marijuana (his only criminal record whatsoever) was insignificant.

This matter should at least be remanded for a re-sentencing hearing to be held for the Court to consider those factors and make appropriate findings.

CONCLUSION

The petitioner was denied significant constitutional rights, sentenced disparately by the lower Court without sufficiently expressed mandatory analysis, and should be granted a new sentencing hearing.

Respectfully submitted,



Jerry Blair, WVSB No. 5924

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NO. 12-1413

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CERTIFICATE OF SERVICE

I, Jerry Blair, hereby certify that I have on this 16th day of February, 2013 given notice of the filing of the "Petitioner's Brief" and "Appendix" by priority mailing of a true copy of the same to counsel of record as follows:

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