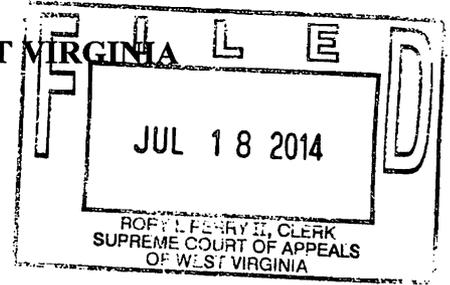


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0437



STATE OF WEST VIRGINIA

**Plaintiff Below,
Respondent,**

v.

**No. 14-F-51 / 14-M-12
(Kanawha County)**

ROY DALE MCKEAN

**Defendant Below,
Petitioner.**

PETITIONER'S BRIEF

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Cases

State v. Peacher, 167 W.Va. 540, 280 S.E.2d 559 (1981)

State v. Finley 177 W.Va. 554, 355 S.E.2d 47 (1987)

State v. Beck, 286 S.E. 2d 234 (W.Va. 1981)

Rules

Rule 404(b) of the West Virginia Rules of Evidence

Constitutional Provisions

The United States Constitution's Sixth and Fourteenth Amendments

Article III Section 14 of the West Virginia Constitution

ASSIGNMENTS OF ERRORS

The jury in the Defendant's trial could not afford the Defendant a fair trial following a potential juror's statement during *voir dire*.

STATEMENT OF THE CASE

The Petitioner was tried on February 10, 2014 on an eight count indictment following an incident occurring on November 2, 2013. The Defendant was tried before a jury of twelve (12) with two (2) alternates.

During *voir dire*, the Court inquired of the pool of potential jurors, whether any of them had any relations with or otherwise knew any of the parties involved, the attorneys or any other individuals involved that could inhibit their ability to an unbiased verdict. (A.R. Pages 1-3). One juror, a Kanawha County Deputy, Sheriff, James Elkins, stated during *voir dire*, in the presence of the entire jury pool assembled in the court room, that "I'm employed by the Kanawha County Sheriff's Office. I believe I have arrested Mr. McKean in the past" (A.R. Page 4). At this point the Court called the attorneys, the Petitioner, and Deputy Elkins to the bench. (A.R. Page4). The Court admonished Deputy Elkins that he should have known better than to have made the statement in front of the jury pool and excused the deputy from the jury pool (A.R. Pages 4-5). Following the Court's discussion with Deputy Elkins, the Petitioner moved for a new jury pool based on the statement made in that the potential jurors would have a tainted perception of the Petitioner (A.R. Page 6).

The State asked that the Court attempt to cure with an instruction rather than a new jury panel (A.R. Page 6). After further discussion, the Court stated to the jury panel

“All right, ladies and gentlemen, I’m going to instruct you to disregard what that last juror said. Just because one’s arrested doesn’t mean that they are guilty of anything. Is there any juror here who cannot set that aside and judge this case strictly on the merits of the evidence in this case, or is the fact that he was arrested on some prior occasion that we don’t know when or what it was about or any of those circumstances of it, that would so preoccupy you that you would not be able to be fair and impartial to him? And it’s okay to tell me that it’s going to affect your judgment in this case, because that’s what I want to know, if it’s going to impact you in any way. Is there any juror who that last juror’s statements might impact in any regard? Okay, the record will reflect that there were no hands raised” (A.R. Pages 7-8).

A jury was selected from the remaining jury panel and the trial commenced on the same day. The jury found the Petitioner guilty on all counts presented to them following a brief deliberation period on the same day.

The Petitioner filed a Motion for a New Trial which was argued before the court on March 12, 2014 prior to sentencing, to which the court denied. (A.R. Pages 9-11). The Petitioner was then sentenced to the penitentiary on all counts.

SUMMARY OF ARGUMENT

The Court erred in not granting the Petitioner’s Motion for a new jury panel following the jury pool member Deputy Elkins’ statement that he had arrested the Petitioner in the past, thus tainting the perception of the Petitioner to the jury pool. Despite the Court’s instruction to disregard the statement, an individual cannot un-hear what has been heard.

STATEMENT REGARDING ORAL ARGUMENT AND 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 this action are adequately presented and as such, oral arguments are unnecessary for the Court to make an informed decision.

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

ARGUMENT

I. Standard of Review

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

II. Argument

The United States Constitution's Sixth and Fourteenth Amendments as well as Article III Section 14 of the West Virginia Constitution have been interpreted by this Court as providing that meaningful *voir dire* operates to ensure that a defendant receive a fair trial. This Court in Syl. Pt. 4 had noted that "The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14 of the West Virginia Constitution. A meaningful and effective *voir dire* of the jury panel is

necessary to effectuate that fundamental right.” State v. Peacher, 167 W.Va. 540, 280 S.E.2d 559 (1981).

As the Deputy’s statement was made before the entire jury panel, regardless of whether they responded to the Court’s inquiry by stating it would not have affected their ability to render an unbiased verdict, the all heard the Deputy state the Petitioner had been previously arrested. This undoubtedly would have placed in their minds, the knowledge that the Petitioner had a criminal record and as such, would have skewed their opinion of him making it less likely that they could return an unbiased verdict.

This case is distinguishable from this Court’s decision in State v. Finley 177 W.Va. 554, 355 S.E.2d 47 (1987), and others where statements by potential jurors were made during *voir dire* and the offending juror was dismissed from the panel and the Court made inquiry as to whether they could remain unbiased. In the present case, the remark was made by a Kanawha County Deputy Sheriff, stating the Petitioner had been arrested, thereby disclosing a prior bad act by the Petitioner.

The statement made by the Deputy is much the same as contemplated in Rule 404(b) of the West Virginia Rules of Evidence wherein, evidence of other crimes inadmissible “to prove the character of a person in order to show that he or she acted in conformity therewith.” In other words, the Deputy’s statement went far and above the statements made by ordinary citizens or a jury panel as contemplated in Finley.

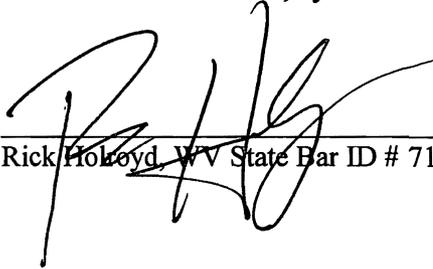
This Court has acknowledged that the goal of jury selection is “to secure jurors who are not only free from prejudice, but who are free from suspicion of prejudice.” State v. Beck, 286 S.E. 2d 234 (W.Va. 1981). It is therefore asserted that the statement made by the Deputy rises above the level of an off-hand remark made by a non-law

enforcement officer and that it rises to the level of a Rule 404(b) statement causing the judges denial of Petitioner's Motion for a new jury pool reversible error.

CONCLUSION

For the reasons more fully explained, the Petitioner requests this Court declare a mistrial and remand this matter to the Circuit Court for further proceedings.

RESPECTFULLY SUBMITTED
ROY DALE MCKEAN, by Counsel



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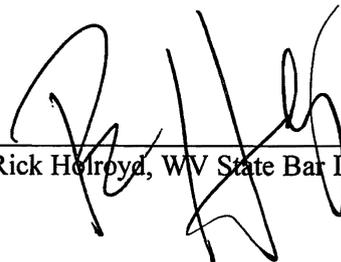
**Defendant Below,
Petitioner.**

CERTIFICATE OF SERVICE

The undersigned Counsel for the Petitioner hereby certifies that I have, on this day, served a copy of the foregoing **PETITIONER'S BRIEF**, via regular U.S. Mail, postage prepaid, to the following:

Fred Giggerbach, Assistant Prosecuting Attorney
Kanawha County
301 Virginia Street East
Charleston, WV 25301

Date: 7-18-14


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