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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

vs. **SUPREME COURT NO. 14-1101**

JOSHUA NEAL HUBBARD,
Defendant Below, Petitioner

PETITIONER'S REPLY BRIEF

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I.

TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....3

STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....4

ARGUMENT.....5

CONCLUSION.....10

II.

TABLE OF AUTHORITIES

STATUTES:

W.Va. Code §62-1-5.....9

RULES:

West Virginia Rule of Criminal Procedure 5(a).....9

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is necessary.

Pursuant to Rule 19(a) of the West Virginia Rules of Appellate Procedure, this appeal should be scheduled for oral argument because this appeal raises an assignment of error in the application of settled law.

Pursuant to Rule 19(g) of the West Virginia Rules of Appellate Procedure, the Petitioner argues that the issue presented in this appeal merits a signed opinion by this Honorable Court.

IV.

ARGUMENT

The Respondent's Brief relies on facts contained nowhere in the evidence of this proceeding, mischaracterizes the Petitioner's argument and is unresponsive to the factual inconsistencies argued by the Petitioner.

The Respondent's Brief relies on facts contained nowhere in the evidence of this proceeding. The Respondent, in attempting to make sense of the conflicting testimony of the two Troopers at the July 10, 2014, suppression hearing, simply regurgitates the language contained in the lower Court's Order denying the Petitioner's Motion to Suppress. The Respondent restates the findings contained in the lower Court's Order that, "the discrepancy between the officers can be easily explained," and that, "Corporal Davis heard on the radio that [Petitioner] was in custody" and then "called Sergeant MaKenzie" and "offered his help." *Respondent's Brief Pgs. 5-6, App. 1 at 27.* All parties and the lower Court unquestionably recognize that there are inconsistencies in the Troopers' testimony. The problem is that the facts relied upon by the Respondent and the lower Court to rectify the inconsistencies are not in the evidence elicited in this proceeding. They appear for the first time in the lower Court's Order. *App. 1 at 27.*

As discussed in the Petitioner's Brief, the factual finding that the Corporal heard on the radio that the Petitioner was in custody and then called the Sergeant to offer his help are contained nowhere in the evidence elicited in this proceeding. Also, Corporal Davis testified to more than just "offering his help". He testified that, during the Petitioner's transport, he called Sergeant Makenzie by telephone and told Sergeant Makenzie that he would meet him at the Lewisburg Detachment for the "actual interview" of the Petitioner. *App. Volume 2, Page 47.* In addition to the fact that Sergeant Makenzie did not tell Corporal Davis during their telephone conversation

anything about the Petitioner wishing to give a statement, and to the fact that Corporal Davis had no contact with the Petitioner from the time of his arrest until the Corporal's arrival at the detachment, from Corporal Davis' testimony, it is obvious before he had any possible way to know whether or not the Petitioner had offered to give a statement, the Troopers' primary purpose in taking the Petitioner to the police detachment was to obtain a statement from him prior to presentment to a Magistrate. There is simply no other reasonable explanation for the Corporal's statements during that telephone call to the Sergeant.

In his brief, the Petitioner did not assert and does not assert now, that the prompt presentment rule is violated by police processing. This characterization of the Petitioner's argument in the Respondent's Brief is inaccurate. However, the record is clear that no police processing occurred until after the Troopers obtained a recorded statement and that processing took only a matter of minutes. *App. Volume 2, Page 42.* Likewise, the Petitioner did not assert and does not assert now, that the time reasonably required for transporting the Petitioner to the police detachment, or the time required for recording the Petitioner's statement constitutes unreasonable delay. Again, this characterization of the Petitioner's argument is inaccurate.

The Respondent's brief is unresponsive as to factual inconsistencies asserted by the Petitioner. The Respondent states, as unquestionable fact that the Petitioner stated to Sergeant Makenzie in the cruiser that he wished to tell his side of the story, and that therefore, "concern for the Prompt Presentment rule ceased to exist." *Respondent's Brief at Page 6 and 10.* As asserted in the Petitioner's Brief, the Troopers' testimony and the Prosecuting Attorney's representation to the Court as to exactly when the Petitioner allegedly said he wanted to tell his side of the story are, respectfully, all over the map. Corporal Davis testified that the first time he became aware that the Petitioner wanted to give a statement was, "Basically as soon as I started

talking to him," which was between 5:10 p.m. and 5:35 p.m., after Corporal Davis arrived at the Lewisburg Detachment. *App. Volume 2, Page 59-60.* This begs the question why then, if Corporal Davis did not know until he arrived at the detachment that the Petitioner wanted to give a statement, did he ask Sergeant Makenzie in an earlier telephone conversation if he should meet the Sergeant at the detachment for the "actual interview."

Curiously, despite the Respondent's contention that the Petitioner stated in the cruiser during transport to Sergeant Makenzie that he wished to tell his side of the story, Sergeant Makenzie testified that shortly upon arrival at the Lewisburg detachment, he *Mirandized* the Petitioner and, "explained to him what information we had gathered through our investigation to that point, and ask(ed) if he wished to make a statement or tell his side of the story." *App. Volume 2, Page 13.* This begs the question why then, if the Petitioner had already told the Sergeant in the cruiser that he wished to tell his story, did the Sergeant have to explain the information already gathered and ask the Petitioner if he wished to tell his side of the story once at the detachment. This also begs the question why then, if the Petitioner had already told the Sergeant in the cruiser that he wished to tell his side of the story, did it take approximately two hours of unrecorded conversation between the Troopers and the Petitioner before the tape recorder was turned on and the statement was given.

Sergeant Makenzie also testified that to the best of his knowledge, the Petitioner, "made no statements about the crime prior to being Mirandized," and further, that there was nothing in his report or that he intended to offer at trial concerning any statement the Petitioner made from the point of his arrest to the point where the Sergeant talked to him. *App. Volume 2, Page 12.* The Respondent's entire brief is based on the assertion that the protections of the prompt presentment rule ceased once the Petitioner informed Sergeant Makenzie in the cruiser, prior to being

Mirandized that he wanted to give a statement. Clearly then, this alleged statement must be introduced into evidence, otherwise, the prompt presentment rule has been violated. This begs the question why then, if this alleged statement was the justification for the delay, did the investigating officer testify that the Petitioner made no statements prior to being *Mirandized* that the officer intended to offer into evidence. This alleged statement is arguably the most important statement in the State's case because otherwise the Petitioner's recorded statement would be inadmissible. It seems unfathomable that the Sergeant would testify that he did not intend to introduce it as evidence against the Petitioner. To further complicate the ifs and whens of this alleged statement, the Prosecuting Attorney informed the lower Court that he was advised, presumably by the investigating officer, that the statement was made "at the site of the arrest." *App. Volume 3, Page 11.*

Rather than addressing these inconsistencies, the Respondent's brief simply ignores them and states as fact that the Petitioner said in the cruiser to Sergeant Makenzie that he wished to tell his side of the story. The reason that the Respondent provides no explanation for the inconsistencies is because the only logical explanation, when all the testimony and the Prosecutor's statement are considered as a whole, is that the Petitioner did not offer, out of the blue, in the cruiser, or at the site of the arrest, or at the detachment after hearing the evidence already gathered, to tell his side of the story. Instead, he gave a recorded statement after spending approximately two hours in the police detachment engaged in an unrecorded conversation by the Troopers wherein he was encouraged by them to give a recorded statement. The inconsistencies call into question not only when the statement was made but if it was made at all. Likewise, the Respondent's brief not only ignores them but is unresponsive as how they can all be logical and consistent. The obvious explanation for the Respondent's unresponsiveness is that but for this alleged spontaneous

utterance by the Petitioner, the actions of law enforcement violated the prompt presentment rule contained in West Virginia Code 62-1-5 and Rule 5(a) of the West Virginia Rules of Criminal Procedure.

V.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that this Honorable Court reverse the conviction and sentence below, and remand the case to the Circuit Court of Monroe County.

Respectfully Submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I, Richard M. Gunnoe, do hereby certify that on the 2nd day of June, 2015, a copy of the foregoing Petitioner's Brief was mailed to David Stackpole, Assistant Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25305.

RICHARD M. GUNNOE
Counsel for Petitioner