

FILED

July 9, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Starcher, C. J., dissenting:

I dissent, because the majority has entirely missed the point on the central issue in this case.

Mr. McAlister was the main witness against Mr. Johnson. Mr. McAlister's credibility was a key issue in the case. On the prosecution's motion, the trial judge refused to let the jury hear facts about Mr. McAlister's story that made that story questionable. As a result, the jury did not get a fair chance to assess Mr. McAlister's credibility.

Mr. McAlister first began to claim to be the victim of a crime only *after* the hospital where he was being treated for a gunshot wound decided to call the police. Mr. McAlister then told the police he had been robbed while he was "stopped" in a rough neighborhood where he did not live. Mr. McAlister did not mention anything about a drug transaction occurring during this "stop." However, because the hospital's blood test showed that Mr. McAlister had recently been using crack cocaine, he did admit to having used cocaine. He claimed this drug use occurred *after* he was shot — although he did not say when and where he had acquired the drugs.

At trial, the defendant did not want to question the accuracy of Mr. McAlister's purported identification of the defendant. Rather, the defendant wanted to use the drug use

evidence to argue that Mr. McAlister left work and went to a rough neighborhood, where he was involved in a drug deal that got violent — and that Mr. McAlister later *made up* the robbery story.

After all, what evidence was there, other than Mr. McAlister's testimony, that any robbery was ever committed?

The defendant's objection to the prosecution's motion *in limine* went not to the identification question, but was based on the defendant's right to confront his accuser, Mr. McAlister, with facts that undermined Mr. McAlister's claim that he was the victim of a crime in the first instance.

If the issue was solely the effect of the drug evidence on the issue of witness identification, I might agree with the majority. But the drug evidence had nothing to do with identification -- and everything to do with the "victim's" motive to fabricate a crime in the first instance.

In summary, the jury was denied key evidence with which to assess Mr. McAlister's credibility, on the issue of whether any crime was ever committed.

The defendant was clearly denied a fair trial. I strongly dissent.