STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia
Plaintiff below, Respondent

vs) No. 101473 (Marion County 08-F-48)

Tywaun Tramel Coakely-El
Defendant below, Petitioner

FILED
May 16, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Tywaun Tramel Coakely-El, convicted by jury of two counts of delivery of a controlled substance and one count of delivery of a controlled substance within 1000 feet of a school, files this timely appeal of the circuit court order sentencing him to serve two concurrent terms of one to fifteen years, and a one to five year term, to be served consecutively with the first two counts. The State has filed a response to the petition.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on February 7, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was indicted on two counts of delivery of a controlled substance and two counts of delivery of a controlled substance within 1000 feet of a school after selling a controlled substance to a confidential informant. Petitioner appeared for arraignment and demanded to proceed *pro se*. The State moved for a determination of petitioner's competency during the arraignment, and thus the court suspended the arraignment until a competency determination could be made. Petitioner was found incompetent, spent time at Sharpe Hospital, and then was found competent to stand trial. Petitioner continued to insist on proceeding *pro se*, but the circuit court appointed standby counsel to assist. Petitioner proceeded to trial *pro se*. Petitioner was found guilty at trial on all four counts; however, after the trial, the circuit court granted one of petitioner's post trial motions, which dismissed one count of delivery of a controlled substance within 1000 feet of a school, as the State admitted the two counts were duplicative.

Failure to Dismiss One Count of the Indictment

Petitioner's first assignment of error is that the circuit court erred in not dismissing one count of delivery of a controlled substance within 1000 feet of a school prior to trial. Petitioner argues that his rights were violated, as the State presented four counts, rather than three, thus creating greater prejudice against him. He also argues that his sentence was harsher because there were four counts rather than three. The fourth count was dismissed post-trial, as the State admitted that it occurred out of the same transaction as the third count, but the State argues that Petitioner suffered no harm from the presentation of all four counts at trial. There is no indication in the record that Petitioner attempted to have this count dismissed prior to trial. After a review of the record in this matter, this Court agrees that the failure to dismiss one count of the indictment prior to trial does not constitute reversible error.

Failure to Conduct an Arraignment Hearing

Petitioner's second assignment of error is that the circuit court erred in not conducting an arraignment hearing. Regarding the failure to hold a formal arraignment, this Court holds that "[s]o long as a defendant has not been denied any constitutional or statutory right, but, to the contrary, has been afforded all constitutional and statutory protections to which he is entitled, mere technical errors that do not deprive or unduly prejudice the defendant in the conduct of his defense will be considered harmless." *State v. Grimmer*, 162 W.Va. 588, 594, 251 S.E.2d 780, 785 (1979), overruled on other grounds by *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980). Petitioner argues prejudice by the failure of the circuit court to conduct a proper arraignment. Petitioner asserts that he was unable to properly examine the evidence and investigate witnesses. He argues that because he was *pro se*, he was more harmed by the failure to conduct an arraignment than someone represented by counsel. The State responds, arguing that petitioner's competency evaluation found that he was never in fact incompetent to stand trial, as the original diagnosis of bipolar disorder which led to the conclusion that petitioner was incompetent was incorrect. Further, the State contends that no prejudice occurred, as petitioner was aware of the charges against him, the potential penalties, and of his right to trial by jury, as he proceeded to trial. After review of the record, this Court finds that the failure to hold a full arraignment hearing is not reversible error under the facts of this case.

Newly Discovered Evidence

Petitioner's third assignment of error is that the court erred in not awarding a new trial following discovery of new evidence. Petitioner submitted an affidavit from another prisoner indicating that the confidential informant purchased drugs from another party after petitioner

was dropped off at a hotel, and then claimed that petitioner had sold her the drugs. This Court has held as follows:

> A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his [or her] affidavit that [the defendant] was diligent in ascertaining and securing [the] evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

Syl. pt. 1, *Halstead v. Horton,* 38 W.Va. 727, 18 S.E. 953 (1894); Syl., *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979); Syl. Pt. 3, *In re Renewed Investigation of State Police Crime Laboratory, Serology Division,* 219 W.Va. 408, 633 S.E.2d 762 (2006); Syl. Pt. 1, *State ex rel. Smith v. McBride,* 224 W.Va. 196, 681 S.E.2d 81 (2009). The State argues that the evidence is not new to petitioner, as the affiant was with petitioner when he allegedly sold the confidential informant the drugs, and the affidavit notes that the affiant is a family friend of petitioner. After reviewing the record and the applicable legal standard, this Court agrees that petitioner is not entitled to a new trial based on newly discovered evidence.

Denial of Petitioner's Motion for Judgment of Acquittal

Petitioner's fourth assignment of error is that the circuit court erred in not granting his motion for judgment of acquittal. "The Court applies a *de novo* standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Minigh,* 224 W.Va. 112, 124, 680 S.E.2d 127, 139 (2009). Petitioner argues that the confidential informant was never shown in the video surveillance receiving drugs or giving petitioner money, and that she was not properly searched both before and after the alleged sale. The State argues that officers properly searched the confidential informant before and after each transaction, and that unalterable audio and video surveillance was used throughout the transactions. After reviewing the record, this Court finds no error in the circuit court's denial of the motion for judgment of acquittal.

Failure to Safeguard Defendant's Rights

Petitioner's final assignment of error is that the circuit court erred in not taking additional steps to safeguard the petitioner's rights when he was deemed incompetent to proceed to trial. Petitioner makes a somewhat vague argument that that pre-trial hearings could have been conducted, and that the court could have further prepared him regarding the evidence to be introduced against him. He also notes that he could have had more assistance in his cross-examination of the prosecution's witnesses and the court could have helped him secure witnesses, but does not explain how the circuit court could have properly assisted. The State argues that petitioner's allegations of a lack of assistance by the circuit court are vague. In this matter, the record shows that petitioner continuously insisted on proceeding *pro se*, and although standby counsel was available throughout the proceedings, petitioner refused to accept his assistance through most of the proceedings. This Court has found that:

> A defendant in a criminal proceeding who is mentally competent and *sui juris*, has a constitutional right to appear and defend in person without the assistance of counsel, provided that (1) he voices his desire to represent himself in a timely and unequivocal manner; (2) he elects to do so with full knowledge and understanding of his rights and of the risks involved in self-representation; and (3) he exercises the right in a manner which does not disrupt or create undue delay at trial.

Syl. Pt. 8, *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983). Moreover, "[t]he right of self-representation is a correlative of the right to assistance of counsel guaranteed by article III, section 14 of the West Virginia Constitution." Syl. Pt. 7, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

The State argues that petitioner was found competent, and demanded repeatedly to proceed *pro se*. Furthermore, the circuit court appointed standby counsel, struck jurors on petitioner's behalf, and made petitioner's motion for judgment of acquittal for him. Upon a review of the record, this Court finds that the circuit court properly safeguarded petitioner's rights and finds no error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 16, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh