

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent,**

vs) No. 101548 (Pocahontas County 08-F-31)

**Travis S. Dean,
Defendant Below, Petitioner**

FILED

June 24, 2011

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

MEMORANDUM DECISION

Petitioner Travis S. Dean appeals his convictions for two counts of breaking and entering, felonies in violation of West Virginia Code § 61-3-12, and one count of petit larceny, a misdemeanor in violation of West Virginia Code § 61-3-13(b). The State filed a timely summary response.

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 March 3, 2011. This Court has considered the parties' briefs and the record on appeal. 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.

I.

In his first assignment of error, petitioner argues that the introduction of irrelevant, confusing, and inflammatory evidence unfairly prejudiced his right to a fair trial. Specifically, he asserts that the investigating officer, Trooper Agee of the West Virginia State Police, made multiple references to unrelated domestic disputes involving petitioner. The State responds that Trooper Agee made only two references to a possible domestic incident while explaining why he was present at petitioner's residence and found stolen goods. At trial, defense counsel objected both times and bench conferences were held. Unfortunately, the discussions were largely inaudible for purposes of the transcript, so this Court is not certain exactly what was said. The transcript indicates that the circuit court denied a motion

for mistrial and, at the conclusion of the second bench conference, directed someone to “be careful.”

“‘The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.’ Syllabus point 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).” Syl. Pt. 1, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999). Upon a review of this matter, we do not find that the circuit court abused its discretion in the handling of this evidentiary issue. The references to a possible domestic incident were limited, addressed by the court, and in light of the other evidence at trial, we do not believe that these references impacted the outcome of the trial. Petitioner was accused of stealing goods which were discovered in his residence when his live-in girlfriend, Jessica Canon, contacted police and consented to a search.

II.

In his second assignment of error, petitioner argues that the circuit court erroneously denied his motion to suppress any references to a Nikon camera that he was accused of stealing. The evidence at trial was that Trooper Agee and Ms. Canon found this digital camera in petitioner and Ms. Canon’s residence, looked at the photographs saved to the camera, and recognized people in the photographs as Cheryl Dean and Ms. Dean’s son. Ms. Dean reported to police that her Nikon camera was stolen. Soon after recovering the camera, police returned it to the Dean family, thus petitioner did not have the opportunity to inspect the camera or perform testing, such as fingerprint testing. Petitioner speculates that the camera might have presented exculpatory evidence and the State should have retained it per the directives of *State v. Osakalumi*, 194 W.Va. 758, 461 S.E.2d 504 (1995).

The State responds that it is not clear whether defense counsel ever requested the camera and petitioner has not shown that the State had a duty to retain the camera. Moreover, the State argues that even assuming *arguendo* that it had a duty to retain the camera, there is no showing of any intentional misconduct by police. Additionally, the trial testimony conclusively established that the camera belonged to Ms. Dean and was found in petitioner’s residence. Not only did Trooper Agee and Ms. Canon recognize people in the photographs as Ms. Dean and her son, but Ms. Dean testified at trial that the camera returned by police was her camera. Defense counsel conceded during closing argument that “[t]he camera, this camera was in the residence. And it was, I don’t think there was any doubt that it was Ms. Cheryl Dean’s camera.”

Petitioner relies on our opinion in *Osakalumi*, where we held the following in Syllabus Point 2:

When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

Upon a review of this matter, we agree with the State's argument that, even assuming defense counsel did request the camera and even if the State had a duty to retain it, no consequences should flow from the alleged breach.

III.

In his final assignment of error, petitioner argues that his due process rights were violated when the circuit court continued his trial out of the term of court in which he was indicted. West Virginia Code § 62-3-1 provides, in part, that a defendant “shall, unless good cause be shown for a continuance, be tried at the same term.” The State had moved to dismiss the indictment because its main witness, Trooper Agee, was unavailable to testify at the scheduled trial due to medical reasons. Instead of dismissing the indictment, the circuit court *sua sponte* continued the trial finding good cause based upon Trooper Agee's unavailability.

We have held that whether good cause exists to continue a trial from the term of the indictment is within the trial court's sound discretion. *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 255, 294 S.E.2d 51, 57 (1981). Moreover, a continuance may be on the court's own motion. *Id.* Nothing in the record indicates that the trial court abused its discretion in accommodating the medical leave of the officer. Moreover, petitioner was already incarcerated on an unrelated charge.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 24, 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