STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 101593 (Harrison County 09-F-153-1)

Branden Anthony Davis,
Defendant Below, Petitioner

FILED
April 29, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, Branden A. Davis, appeals from his conviction of conspiracy to commit wanton endangerment involving a firearm. He was sentenced to an indeterminate prison term of one to five years. Petitioner seeks a reversal of his conviction and a new trial. Respondent, State of West Virginia, has filed a timely Response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. 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 states that on January 2, 2009, there was a "drive-by shooting" of an elderly woman's residence in Clarksburg. A joint indictment was returned against three defendants—petitioner (Branden Davis), Roger Davis, and Robert Myers—wherein each man was charged with one count of wanton endangerment involving a firearm and one count of conspiracy to commit wanton endangerment involving a firearm.

A motion to sever was granted, and petitioner was the first co-defendant to be tried. Co-defendant Myers was a witness for the State at both petitioner's and co-defendant Davis's trials. The State indicates that Myers testified that he drove the truck by the residence while petitioner and Mr. Davis were in the back of the truck firing shots at the subject residence. Zach Hostutler, co-defendant Myers's cousin and another person present in the truck at the

time of the shooting, testified at petitioner's trial that Myers was the driver of the truck and that petitioner and co-defendant Davis fired shots into the residence from the bed of that truck.

At the close of the State's case-in-chief, petitioner's trial counsel indicated that he had been unable to secure the attendance of two necessary witnesses, Leon Yancy and Patricia Cross, and that he wanted to play their sworn, audio-recorded statements given to law enforcement. A bench conference took place during which petitioner's trial counsel argued for the admission of the statements for impeachment purposes on the basis that the witnesses were unavailable because their subpoenas were returned as "not found." The State argued that the inability to serve a witness with a subpoena does not mean that the witness was "unavailable" and both the State and the trial court noted that the statements were not "under oath." The trial court ruled that the statements could not come in under any of the West Virginia Rules of Evidence.

The jury returned its verdict acquitting petitioner on the wanton endangerment involving a firearm charge, but finding him guilty of conspiracy to commit wanton endangerment involving a firearm. Petitioner states that he is the only person who has been convicted of the conspiracy since co-defendant Davis was acquitted on both charges in his separate trial and co-defendant Myers had neither been tried nor pled to the indictment.[1]

Petitioner asserts that the statements of Yancy and Cross were admissible under Rule 804(b)(5) of the West Virginia Rules of Evidence and that it was plain error for the trial court to not only disallow the admission of these statements, but to fail to conduct an *in camera* review to determine whether the statements were appropriate or exculpatory. Petitioner contends that during the bench conference, the trial court and the prosecutor told his trial counsel "legally incorrect things" regarding the admissibility of the statements, which caused his counsel to be dissuaded "inadvertently" from presenting such evidence. Petitioner adds that there is a reason that the same evidence, the same State's witnesses with substantially the same testimony, and the same defense (alibi) resulted in different verdicts for petitioner and co-defendant Davis. Petitioner asserts that it is an injustice to allow his conviction to stand and that he should be granted a new trial.

The State asserts that hearsay testimony, which does not fall within a recognized exception under the West Virginia Rules of Evidence, is inadmissible at trial. The State cites

[1] The State indicates in its response that co-defendant Myers was scheduled for entry of a plea on December 21, 2010.

State v. Blankenship, 198 W.Va. 290, 480 S.E.2d 178 (1996), for its argument that in order to show "unavailability" of a witness under Rule 804, petitioner was required to demonstrate that he made a good faith effort to secure witnesses Yancy and Cross for trial by using substantial diligence and that attempted service of a trial subpoena does not show substantial diligence. The State adds that even if substantial diligence had been shown, these statements would still be inadmissible hearsay under *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987), because they do not have the trustworthiness contemplated by the Rules of Evidence as they were not given under oath subject to the penalty of perjury. The State adds that the content of the statements was not offered to prove a material fact and was neither probative nor relevant on the ultimate issue of whether petitioner committed an act with a firearm or conspired to commit an act with a firearm.

"'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). Having reviewed the record and the parties' arguments on appeal under the pertinent standard of review, this Court cannot find an abuse of discretion by the trial court. Accordingly, we affirm.

Affirmed.

ISSUED: April 29, 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