STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0462 (Putnam County 10-F-60)

Stephanie D. Pauley,
Defendant Below, Petitioner

FILED
February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Putnam County, wherein the petitioner was sentenced to a two to ten year sentence of incarceration for felony possession of substances to be used as precursors to manufacture methamphetamine, a one to five year sentence of incarceration for felony conspiracy to operate a clandestine drug laboratory, and a one to five year sentence of incarceration for felony conspiracy to possess substances to be used as precursors to manufacturing methamphetamine, all to run concurrently. The appeal was deemed timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix 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 challenges the circuit court's sentencing order, arguing on appeal that the introduction of her personal use of methamphetamine was irrelevant, prejudicial, and violated West Virginia Rules of Evidence 401, 402, and 403. She further argues that this evidence violated her right to a fair trial because it prejudiced the petitioner in the eyes of the jurors. The methamphetamine petitioner used was manufactured by a co-defendant on a previous date, and she argues it was therefore irrelevant to the charges against her because she was not charged with possession for personal use or possession with intent to distribute. Even if relevant, petitioner believes the evidence should have been excluded under Rule 403 due to its highly prejudicial nature. Petitioner cites *State v. Taylor*, 215 W.Va. 74, 593 S.E.2d 645 (2004), arguing that this Court has held that even if there is a justification for evidence of

narcotics use as a motive for an unrelated crime, its highly prejudicial effect far outweighs any probative value and the evidence should be excluded.

"'This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo.' Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syl. Pt. 1, *State v. Murray*, 220 W.Va. 735, 649 S.E.2d 509 (2007). Additionally, because the Court finds that the evidence petitioner finds objectionable is best classified as evidence of other crimes, wrongs, or acts, the Court must review its admission pursuant to the standard of review for admission of evidence under Rule 404(b) of the West Virginia Rules of Evidence. "The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the 'other acts' evidence is more probative than prejudicial under Rule 403. *See State v. Dillon*, 191 W.Va. 648, 661, 447 S.E.2d 583, 596 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986)." *State v. LaRock*, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

To begin, the circuit court did not commit clear error as to the factual determination of the sufficiency of petitioner's use of methamphetamine, as that evidence came from direct testimony from petitioner's co-defendant. Secondly, we find that the circuit court was correct in finding that the evidence was admissible for a legitimate purpose. Below, a determination was made that the evidence of petitioner's drug use spoke to the crimes with which she was charged, as petitioner and her co-defendant were able to enjoy the fruits of their labor after manufacturing methamphetamine. As such, we decline to find violations of either Rule 401 or Rule 402, as the evidence was relevant and relevant evidence is generally admissible.

Lastly, it was not an abuse of discretion for the circuit court to determine that petitioner's drug use was more probative than prejudicial, as this Court has held that "evidence of uncharged prior acts which is inextricably intertwined with the charged crime is admissible over a Rule 403 objection." *State v. LaRock*, 196 W.Va. 294, 313, 470 S.E.2d 613, 632 (1996). The Court further clarified the meaning of Rule 403, stating that "[u]nfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence." *Id.*, 196 at 312, 470 at 631. While petitioner may argue that the evidence presented was unfairly prejudicial, the Court finds that this is not the case and that the evidence was instead simply damaging to her defense. It is clear that the

evidence of petitioner's personal use of methamphetamine had legitimate probative value, as addressed above. Further, petitioner's reliance on this Court's holding in *Taylor* is misplaced, as the defendant's use of narcotics in that matter was not related to the crimes charged beyond a potential motive for their commission. 215 W.Va. at 76, 593 S.E.2d at 647. As such, petitioner's use of the methamphetamine that was manufactured as a result of the conspiracy with her co-defendant was properly admitted, and the circuit court's decision to admit the same after denying petitioner's motion in limine on the issue does not constitute an abuse of discretion. Therefore, the Court declines to find that a violation of Rule 403 has occurred, because the evidence's probative value was not substantially outweighed by the danger of unfair prejudice to the petitioner.

Petitioner next argues that her rights against double jeopardy were violated by the wording of the indictment and the manner in which evidence was presented at trial. On this assignment of error, we find petitioner's arguments to be without merit. Petitioner argues that counts two and four of the indictment charged her with conspiracy to possess precursors and possession of precursors, respectively. She argues that the State's allegations were that petitioner and her co-defendant conspired in the conjunctive, using "and" to allege their actions, while the disjunctive "or" was not alleged. Thus, a reading of count two is that both defendants had to conspire to possess the precursors, and a reading of count four would be that both defendants possessed the precursors. Simply, conspiracy is an agreement, and to possess an item in the conjunctive by two people, there has to be an agreement between them. Petitioner argues that counts two and four, as alleged, are the same offense. Thus the principles of double jeopardy as expressed in *Blockburger v. United States*, 284 U.S. 299 (1932) are applicable. When the defendants are alleged to commit the offenses in the conjunctive, there is no requirement of an element of proof different from either count; they are the same offense. The United States Supreme Court held in *Rutledge v. United States*, 517 U.S. 292 (1996), that because conspiracy is a lesser included offense of operating a continuing criminal enterprise in concert with others, a person convicted of both can only be punished for one. Petitioner argues that the same logic should apply to this case.

However, it is well settled law that conspiracy to commit an offense and the underlying substantive offense are separate and distinct offenses for double jeopardy purposes. A person charged with and convicted of both offenses can receive a separate sentence for each offense. *See generally Keith v. Leverette*, 163 W.Va. 98, 254 S.E.2d 700 (1979). By its definition, conspiracy requires two individuals, and the use of the disjunctive "or" would not be sufficient to support an allegation of conspiracy. Petitioner was charged with conspiracy under West Virginia Code § 61-10-31, which makes it a crime for "two or more persons to conspire . . . to commit any offense against the state." Likewise, the use of the disjunctive in count four for possession of precursors was unnecessary to constitute the charge contained therein as a separate and distinct offense. West Virginia Code § 60A-10-

4(d) makes it a crime to possess any designated precursors with the intent to use them in the manufacture of methamphetamine.

Simply put, count two charged petitioner with a conspiracy to possess precursors and count four charged petitioner with the perpetration of that conspiracy, which crimes require wholly different elements of proof. Petitioner's reliance on *Rutledge* is misplaced, as that decision held that the defendant therein was entitled to relief because "[a] guilty verdict on a § 848 charge [of engaging in a continuing criminal enterprise] necessarily includes a finding that the defendant also participated in a conspiracy." 517 U.S. at 306. For that reason, conspiracy in that context represents a lesser included offense of continuing criminal enterprise and the Court held that "Congress intended to authorize only one punishment." *Id*. Here, there are separate crimes alleged, with at least one distinguishable element, and we find that petitioner's protections against double jeopardy were not violated.

For the foregoing reasons, we find no error in the decision of the circuit court and the circuit court's sentencing order is hereby affirmed.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

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