

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

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

vs.) No. 11-0739 (Marshall County 09-F-56 & 10-F-27)

**Michael James B. Sr.,
Defendant Below, Petitioner**

FILED

October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Michael James B. Sr.¹, appeal, by counsel Patricia A. Kurelac, arises from the Circuit Court of Marshall County, wherein he was found guilty of six counts of sexual abuse by a parent, guardian, or custodian and sentenced by order entered on October 18, 2010. The State, by counsel Michele Duncan Bishop, has filed its response.

This Court has considered the parties' briefs and the record on appeal. 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 January 17, 2012. The facts and legal arguments are adequately presented, 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 of Appellate Procedure.

This appeal arises from the single trial of two separate criminal indictments involving petitioner. On November 19, 2009, petitioner was indicted by a Marshall County Grand Jury on three counts of sexual abuse by a parent, guardian, or custodian, and one count of use of a minor in filming sexually explicit conduct by a parent, guardian, or custodian. According to the criminal complaint, over several months, petitioner provided alcohol, methamphetamines, and erection-inducing substances to his then fifteen-year-old son, M.B. The criminal complaint further alleges that petitioner directed M.B. to engage in sexual intercourse with petitioner's girlfriend, at times joining in the sexual activity with them.

On July 13, 2010, petitioner was again indicted by a Marshall County Grand Jury on three counts of sexual abuse by a parent, guardian, or custodian, this time involving his daughter. According to the criminal complaint, over the course of three days, petitioner rubbed his genitals on the genitals of his then nine-year-old daughter, C.B., instructed her to insert a sex toy in her vagina on one occasion, and "made her breath[e] out of a pipe" until "she felt dizzy." Following a

¹ In accordance with the Court's policy of protecting the identity of minors and the victims of sexual crimes, and because of the nature of this matter, petitioner will be referred to by his last initial throughout the memorandum decision.

two-day jury trial, petitioner was found guilty of all six counts of sexual abuse by a parent, guardian, or custodian. He was acquitted on the sole charge of use of a minor in filming sexually explicit conduct by a parent, guardian, or custodian. Petitioner was thereafter sentenced to an indeterminate term of ten to twenty years on each count, said sentences to run consecutively for an effective sentence of sixty to 120 years of incarceration.

On appeal, petitioner alleges the three following assignments of error: 1) that the circuit court erred in denying his motion to suppress physical evidence; 2) that he was ineffectively represented by counsel due to the failure to timely file a motion to suppress; and, 3) that the circuit court erred in prohibiting him from using M.B.'s prior inconsistent testimony from the abuse and neglect proceeding for the purpose of impeaching M.B. These assignments of error, as well as the State's responses thereto, are addressed below.

Petitioner first alleges that the circuit court erred in denying his motion to suppress physical evidence because the motion was timely filed and he was entitled to a hearing on the motion. Petitioner filed the motion to suppress on September 1, 2010, while the trial was scheduled to begin on September 20, 2010. According to petitioner, the circuit court's order addressing filing deadlines included an August 27, 2010, deadline for motions in limine, but was silent as to motions to suppress. He argues this Court has specifically distinguished between the two types of motions. The circuit court denied petitioner's motion without a hearing on the issue of the delay or on the merits of the motion itself. Petitioner sought to suppress the personal property items that his son obtained from his residence and gave to the police. According to petitioner, there was no independent source relied upon by law enforcement in later obtaining a search warrant for his residence, only the minor child and the evidence he took from petitioner's residence. Petitioner argues that if the property in question had been deemed inadmissible, then the trial would have proceeded with only the uncorroborated testimony of the minor children, and his guilt would have turned solely on their credibility.

In response, the State argues that the circuit court did not err in denying petitioner's motion as untimely. The State argues that a motion to suppress is a type of motion in limine and that the circuit court's deadline for such motions therefore applies. Further, the State argues that the circuit court's order set August 27, 2010, as the deadline for motions in limine, voir dire, final exhibit lists, case specific instructions, supplemental discovery, and verdict forms. According to the State, this lengthy list should have been sufficient to advise counsel that any filing it wished to offer for the trial court's considerations should have been offered by this date. Further, the State argues that there was nothing on the face of petitioner's motion to suggest a valid basis for the same because petitioner alleged that his son, and not a government actor, seized evidence from his home. The State also argues that petitioner fails to articulate a reason why the child's interview could not support a search warrant.

This Court has previously established the following standard of review:

"When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress,

particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." Syllabus point 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

Syl. Pt. 13, *State v. White*, 228 W.Va. 530, 722 S.E.2d 566 (2011). Based upon our review of the record, the Court finds no merit in petitioner's argument that the circuit court erred in denying his motion to suppress without holding a hearing on the same. To begin, Rule 12(c) of the West Virginia Rules of Criminal Procedure states that a circuit court "may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing." A review of the record shows that the circuit court clearly instructed the parties to file their "*Motions in Limine, Voir Dire, Final Exhibit List, Final Witness List, Case Specific Instructions, Supplemental Discovery and Verdict Form* on or before August 27, 2010." (Emphasis in original). The only remaining deadline in the subject order scheduled jury selection to begin on September 20, 2010. Further, Rule 12(f) of the West Virginia Rules of Criminal Procedure states that

[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, may constitute waiver thereof, but the court for cause shown should grant relief from the waiver.

The record clearly establishes that petitioner failed to raise his motion to suppress by the circuit court's ordered deadline. Petitioner even admits in his petition for appeal that the motion to suppress was filed after the deadline in question. The Court, however, does not find petitioner's argument as to the ambiguity in the circuit court's order persuasive. It is apparent from the order in question that other than the August 27, 2010, deadline for the materials described above, there were no additional deadlines governing the submission of any other types of motions. As such, it is clear that the August 27, 2010, deadline applied to motions to suppress, despite the fact such motions were not expressly delineated in the order. Additionally, it is clear that petitioner lacked good cause to file his motion to suppress outside the time frame set forth by the circuit court. In fact, petitioner makes no argument as to good cause supporting the untimely filing of the motion in his petition for appeal. Petitioner's argument, instead, focuses on an alleged lack of prejudice to the State by virtue of his untimely filing. Further, petitioner was aware of the evidence in question well before the deadline in question, yet failed to file the same in accordance with the circuit court's scheduling order. For these reasons, petitioner lacked the good cause necessary to obtain relief from his waiver of the motion as required by Rule 12(f) of the West Virginia Rules of Criminal Procedure. Therefore, the Court finds no error in the circuit court's denial of petitioner's motion to suppress without holding an evidentiary hearing on the same.

Petitioner next argues that because of the untimely filing of the motion to suppress, he received ineffective assistance of counsel. Petitioner argues that if the Court agrees that the motion to suppress was untimely filed, then the failure to file the same constitutes deficient representation under any standard of reasonableness. Petitioner admits that the record is silent as to the reason for the delay in filing, and further admits that compliance with a trial court's

deadlines does not require a particular degree of legal expertise or knowledge of law. As such, petitioner argues that the only conclusion that can be drawn is gross neglect on the part of his counsel. In response, the State argues that the question of the quality of counsel's representation is premature and that such a claim is more appropriately developed in a petition for writ of habeas corpus. Further, citing a lack of clarity in petitioner's brief, the State argues that evidentiary development concerning petitioner's representation is necessary. The State further argues, however, that even if the motion had been timely filed, the result of the proceedings would have been exactly the same.

Based upon our prior holdings, the Court declines to address petitioner's claim of ineffective assistance of counsel in this direct criminal appeal. As we have previously held,

“[i]t is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.” Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

Syl. Pt. 13, *State v. Jessie*, 225 W.Va. 21, 689 S.E.2d 21 (2009). As the State points out, petitioner admits that questions exist as to the exact timing of the motion's filing. As such, it is clear that a more fully developed record is necessary for purposes of ruling on petitioner's claim of ineffective assistance of counsel, and the Court declines to address this assignment of error on direct appeal.

Lastly, petitioner argues that the circuit court erred when it prohibited petitioner from using his minor son M.B.'s prior inconsistent testimony from the related abuse and neglect proceeding for the purpose of impeaching the child. Petitioner argues that he has a right to cross examine a witness under the Sixth Amendment to the United States Constitution, and further that it is permissible to use evidence against a juvenile witness if it is relevant and not sought to be introduced solely for the purpose of harassment or embarrassment. Petitioner cites to United States Supreme Court precedent wherein a defendant was allowed to use a juvenile witness's record to show bias and prejudice on his part. According to petitioner, the circuit court in this matter improperly applied West Virginia Code § 49-7-3 as a complete bar in all situations under all circumstances.

In response, the State argues that the circuit court did not commit error because West Virginia Code § 49-7-3 states that the child's prior testimony in an abuse and neglect proceeding could not be used for any purpose. The State further argues that an error, if one did occur, is harmless beyond a reasonable doubt. According to the State, petitioner sought to impeach the minor child by pointing to his testimony in the abuse and neglect proceeding wherein he stated that he removed two pipes from petitioner's residence, while in the trial of this criminal matter, the child testified that he removed three pipes. The State argues that the circuit court's ruling in

this regard did not hamper petitioner's ability to attack the child's credibility, as demonstrated by a plethora of potentially damaging evidence ultimately elicited from the witness, including his drug and alcohol use, expulsion from school, and submission to drug testing by petitioner. Lastly, the State argues that if the impeachment evidence had been allowed, the outcome of the matter would have remained unchanged because of the totality of the evidence against petitioner.

We have previously held that “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).” Syl. Pt. 1, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002). The Court declines to address the appropriateness of the circuit court's ruling regarding the admissibility of the witness M.B.'s prior statement for impeachment purposes. Upon review of the record, it is clear that any alleged error, if one occurred, was harmless beyond a reasonable doubt. In this regard, we have previously held that “[f]ailure to observe a constitutional right constitutes reversible error *unless it can be shown that the error was harmless beyond a reasonable doubt.*” Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).” *State v. Stamm*, 222 W.Va. 276, 283, 664 S.E.2d 161, 168 (2008) (emphasis in original). While the Court agrees that petitioner has a constitutional right to cross examine witnesses in a criminal proceeding, we find that the circuit court's ruling preventing petitioner from using his minor son's testimony from the related abuse and neglect proceeding constitutes harmless error beyond a reasonable doubt. Upon review of the record, it appears that petitioner sought to impeach the child's credibility because he testified in the criminal matter that he had taken a pipe used for smoking methamphetamine out of a bedroom, while he testified in the abuse and neglect proceeding that he had never seen that exact pipe. The record shows that the child took multiple pipes from petitioner, and further that the child testified that it was difficult to recall certain things and to concentrate when using methamphetamine. Further, as noted above, petitioner's counsel elicited a great deal of testimony from the child that very successfully attacked his motives and credibility. As such, the Court finds that a minor difference regarding the exact amount of drug paraphernalia that the child removed from petitioner's residence had no impact on the witness's credibility and the circuit court's decision, therefore, constitutes harmless error beyond a reasonable doubt.

For the foregoing reasons, we find no error in the decision of the circuit court, and the petitioner's convictions are hereby affirmed.

Affirmed.

ISSUED: October 22, 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