STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0988 (Ritchie County 10-F-1)

J. D. Lambert, Defendant Below,
Petitioner

FILED
March 9, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner J. D. Lambert, by counsel, Jay W. Gerber Jr., appeals his conviction as a recidivist on the ground that members of the jury pool may have seen him wearing an orange prison jumpsuit prior to trial. The State of West Virginia, by counsel, Laura Young, filed a summary response. Petitioner's counsel also filed an *Anders*[1] brief arguing that petitioner's conviction should be reversed on the ground that the circuit court erred in admitting documentary evidence against petitioner that was not disclosed by the State prior to trial. The State did not respond to the *Anders* brief.

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 of Appellate Procedure.

On December 7, 2010, a jury found petitioner to be the individual who committed three felony offenses: attempting to operate a clandestine drug lab, possession with intent to deliver marijuana, and grand larceny. Petitioner was sentenced as a recidivist to life with parole eligibility after fifteen years. More than five months later, sometime on or after May 17, 2011, petitioner told his counsel that on the morning of his recidivist trial, he believed members of the jury pool saw him wearing his orange prison jumpsuit while he was waiting in a conference room adjacent to the entrance to the courtroom.

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[1]*Anders v. State of California*, 386 U.S. 738 (1967), was adopted by the Court in *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

Petitioner analogizes the facts of his case to those in *State v. Reedy*, 177 W.Va. 406, 352 S.E.2d 158 (1986), in which the defendant was seen wearing prison attire prior to voir dire by jurors later impaneled for the defendant's recidivist proceeding. Reedy appealed on the ground that his prison attire allowed the jury to witness evidence that the State would otherwise have to prove. Although the underlying conviction in *Reedy* was overturned on other grounds, the Court stated as follows:

> We realize that a jury in a recidivist proceeding will learn from other evidence that the appellant has in fact been convicted of the most recent felony. We do not believe, however, that this diminishes the prejudice of requiring a defendant to appear at a recidivist proceeding in identifiable prison attire.

Id. at 417, 352 S.E.2d at 169.

There is no evidence in the record that potential jurors saw petitioner wearing prison attire.[2] "To permit this court to review an error assigned by an appellant, a record of the assigned error must be submitted for this Court's consideration." *Skidmore v. Skidmore*, 225 W.Va. 235, 247, 691 S.E.2d 830, 842 (2010) (per curiam). Further, petitioner failed to tell his counsel or the court about the alleged incident in a timely manner. "As a general rule, . . . errors assigned for the first time in an appellate court will not be regarded in any matter . . . which might have been remedied in the trial court if objected to there." Syl. Pt. 17, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). If petitioner had made a contemporaneous report that he believed potential jurors had seen him in prison attire, the trial court could have taken corrective action. The failure of a litigant to assert a right in the trial court will likely result in the imposition of a procedural bar to an appeal of that issue. *State v. Miller*, 194 W.Va. 3, 17, 459 S.E.2d 114, 128 (1995).

Anders **Appeal**

In his *Anders* brief, petitioner argues that the circuit court erred in admitting into evidence petitioner's certificate of conviction for grand larceny because the State had not disclosed it to petitioner prior to trial. In response to petitioner's objection to the admission of the certificate of conviction, the circuit court ruled that, although it should have been disclosed, petitioner was not surprised by a material fact or prejudiced by its entry because the information contained in the certificate of conviction was essentially identical to the information contained in petitioner's recidivist bill of information.

"A trial court's evidentiary rulings . . . are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998).

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[2]Importantly, unlike the defendant in *State v. Reedy*, 177 W.Va. 406, 352 S.E.2d 158 (1986), petitioner changed into street clothes prior to voir dire.

In Syllabus Point 2 of *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1995), we stated as follows:

> The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case.

In light of *Rodoussakis* and *Rusen*, we find that the circuit court did not abuse its discretion in admitting petitioner's certificate of conviction for grand larceny because it contained no new information and, thus, did not surprise petitioner regarding a material fact or hamper the preparation or presentation of his case.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 9, 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