

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

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

vs) No. 11-1094 (Fayette County 10-F-10)

**Scott B. Burgess,
Defendant Below, Petitioner**

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Scott B. Burgess, by counsel Richard H. Lorensen, appeals the Circuit Court of Fayette County's order dated June 21, 2011, sentencing him to life with mercy after his conviction by jury of one count of felony murder. The State, by counsel Laura Young, 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 of Appellate Procedure.

This case concerns the arson of a mobile home wherein petitioner was residing with eleven other individuals. On July 19, 2009, a fire was reported at the mobile home and volunteer firefighters responded. After the fire was extinguished, a body was found in the home. The medical examiner determined that the victim died of smoke inhalation. At the time of the fire, Deputy Shannon Morris was off duty, attending a cookout with family. When the fire was reported, he was invited by family members who were volunteer firefighters to ride along. On the way to the fire, Deputy Morris saw petitioner walking away from the fire along the road. Deputy Morris was familiar with petitioner, having arrested him in the past on more than one occasion. Petitioner was also seen by others who passed by the fire, although there was conflicting testimony as to how far from the fire petitioner was seen and at what time the fire was first discovered. As the firefighters fought the fire at the mobile home, Deputy Morris, dressed in a t-shirt and shorts and without his badge or gun, located petitioner, told him that his mobile home was on fire, and asked what was going on. Deputy Morris testified that petitioner told him "arson" and indicated that since the home was his, he could do with it as he wished.

After petitioner was indicted, he moved to suppress the statements allegedly made to Deputy Morris. Petitioner argued that he was in the custody of Deputy Morris but was not given proper *Miranda* warnings. After a hearing, the motion was denied and the statements were allowed into evidence at trial.

At trial, petitioner's ex-wife testified that the night before the fire, she told petitioner she was leaving him, and he thereafter threatened to burn her possessions. There was also testimony that on the day of the fire, petitioner had been told that his home had been sold at a tax sale and he had met with the new owner. Petitioner's neighbor testified that petitioner was angry about the sale and that petitioner told him that if he could not have the home, then no one else could have it. Another woman who lived in the mobile home testified that petitioner was agitated that day and had a horrible temper. The jury convicted petitioner of felony murder, and he was later sentenced to life with mercy.

On appeal, petitioner first argues that the circuit court erred in finding that he was not in custody when he gave incriminating statements to Deputy Morris without *Miranda* warnings. Petitioner argues that he knew that Deputy Morris was a law enforcement officer due to his prior arrests, and that Deputy Morris blocked his progress, asking him questions that "made him mad." Petitioner argues that he was detained by Deputy Morris until another officer arrived and placed him in custody, and therefore he was never free to leave. Petitioner argues that the deputy came from the scene of the fire and asked questions about the fire and, thus, was exercising his power as a police officer without giving the petitioner *Miranda* warnings.

The State responds, arguing that petitioner was not in custody when he gave the statements to Deputy Morris and was free to leave at any time. The State also argues that the deputy was in street clothing and had simply accompanied family members who are volunteer firefighters to the fire. The State points out that this Court is to give deference to the circuit court's factual findings, and petitioner has not shown that the circuit court applied an incorrect legal standard in denying the motion to suppress.

This Court has stated as follows:

This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.

Syl. Pt. 2, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994). This Court has also discussed custodial interrogations as follows:

A trial court's determination of whether a custodial interrogation environment exists for purposes of giving *Miranda* warnings to a suspect is based upon whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest.

The factors to be considered by the trial court in making a determination of whether a custodial interrogation environment exists, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest.

Syl. Pts. 1 and 2, *State v. Middleton*, 220 W.Va. 89, 640 S.E.2d 152 (2006), *overruled on other grounds*, *State v. Eilola*, 226 W.Va. 698, 704 S.E.2d 698 (2010). In the present matter, the circuit court held an extensive hearing regarding this issue. The evidence shows that petitioner was never prevented from leaving the area and that Deputy Morris was off duty. This Court finds no error in the circuit court's denial of the motion to suppress.

Petitioner also argues that the circuit court erred in failing to grant his motion for a directed verdict, as the evidence showed that he did not have the opportunity to commit the crime. Petitioner argues that the evidence against him was insufficient and that the evidence regarding time, distance, and rapidity of burn prove that he is not guilty. He further argues that the State's evidence showed that the fire was reported at 8:44 p.m., and he was seen approximately a mile and a quarter from the fire. Thus, he asserts that because a mobile home will burn in five to seven minutes, he could not have covered that distance in the amount of time given.

In response, the State argues that the jury found sufficient evidence to convict petitioner. The State argues that petitioner has not met his heavy burden in challenging the sufficiency of the evidence. The State points out that there was conflicting evidence regarding the timing of the fire, as even the firefighters disagreed on what time they arrived at the home. Further, the State argues that petitioner's expert witness at trial did not testify specifically as to how long this fire lasted, but only testified how long mobile home fires burn in general. The State argues that the jury was presented with evidence from multiple witnesses that petitioner threatened to burn his mobile home down and was also presented with evidence of petitioner's statement to Deputy Morris. The State argues that the jury's findings should be affirmed.

"The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, *State v. Juntilla*, 227 W.Va. 492, 711 S.E.2d 562 (2011). In the present case, there was varying testimony regarding petitioner’s distance from his burning mobile home when different individuals saw him. Further, the jury heard testimony concerning petitioner’s statements to Deputy Morris and his threats to burn the home by two different witnesses. The jury also heard the expert testimony, which gave general information as to how mobile homes burn. Viewing the evidence in the light most favorable to the prosecution, the Court finds that the evidence was sufficient to sustain petitioner’s conviction.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 29, 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