

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

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

vs.) No. 11-1277 (Harrison County 09-F-48)

**Benjamin J. Todd,
Defendant Below, Petitioner**

FILED

September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner's appeal, by counsel Jerry Blair, arises from the Circuit Court of Harrison County's August 12, 2011, order resentencing the petitioner following his conviction of first degree arson, burning insured property, and conspiracy to commit burning insured property. The State, by counsel Laura Young, has filed its response.

This Court has considered the parties' briefs and the record on appeal. 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.

On December 12, 2007, a fire began in the home of petitioner's sister, Katherine Stire, while she was Kentucky. Following the fire, Nationwide Insurance paid claims for repairs to the home, personal property loss, and living expenses. However, law enforcement suspected arson, and petitioner was eventually arrested for starting the fire. During the January of 2009 term, a Harrison County Grand Jury indicted petitioner for one count of first degree arson, one count of burning insured property, and one count of conspiracy to commit burning of insured property. Prior to the indictment, petitioner initiated a telephone call with investigating Deputy Fire Marshal Ayersman, during which petitioner discussed the events of the night in question. The conversation was recorded by the marshal, and was later the subject of a hearing in regard to admissibility prior to trial. Following the pre-trial hearing, the circuit court ruled that the statement at issue was admissible pursuant to this Court's holding in *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987). Following a jury trial, petitioner was convicted on all counts, and received the following sentences: ten years of incarceration for first degree arson; two years of incarceration for burning insured property, said sentence to run consecutively to the first degree arson sentence; and, an indeterminate term of one to five years for conspiracy to commit burning insured property, said sentence to run concurrently to the first degree arson sentence. Petitioner was later resentenced for purposes of effecting this appeal.

On appeal, petitioner argues that the circuit court erred in ruling that his statement to Deputy Marshal Ayersman was admissible. Specifically, he argues that his constitutional rights were violated by the circuit court's error because the recorded statement contained false allegations that were used in Deputy Marshal Ayersman's attempt to deceive petitioner during the conversation. During the conversation, the marshal claimed that petitioner's sister and her husband stated that petitioner told them he was going to set fire to the home prior to the fire occurring. According to petitioner, this statement is untrue, and the jury must have given that statement substantial weight in assessing the evidence. According to petitioner, this constitutes reversible error because neither witness ever made such a statement. Based upon this fabricated evidence being presented to the jury, petitioner argues that he was denied a fair trial. Further, petitioner argues that he did not waive or recant his right to counsel during this conversation. Petitioner had been appointed counsel at the time the conversation took place, but had yet to be in contact with the attorney. Petitioner argues that, throughout the conversation, he stated that he did not wish to go any further without first talking to his attorney, but alleges that Deputy Marshal Ayersman ignored the statements and coerced him into continuing the discussion. Petitioner argues that this is not a knowing and intelligent waiver of his right to counsel, and that any such alleged waiver would be set off by his repeated statements during the conversation that he intended to speak with his attorney. For these reasons, petitioner argues that the recorded statement should not have been admitted at trial.

In response, the State argues that the circuit court correctly ruled that the recorded statement was admissible. The State argues that petitioner initiated the conversation, and that, under the totality of the circumstances, petitioner waived his right to counsel by engaging in voluntary conversation. According to the State, while Deputy Marshal Ayersman did not re-read petitioner his *Miranda* warnings in their entirety, he arguably exceeded the mandates of that case by telling the petitioner that "[f]or your benefit, its probably not good for you to talk to me without an attorney present for obvious reasons." Despite this warning, the State argues, petitioner kept talking. Further, the State argues that none of petitioner's statements during this conversation amounts to an assertion that the conversation cease because petitioner requested an attorney. Under the totality of the circumstances, the State argues that petitioner rationally and coherently exhibited the knowledge that he had a right to counsel, and in fact referred to his attorney several times in the conversation. The State asserts that Deputy Marshal Ayersman had no duty to hang up on a criminal defendant who clearly wanted to talk despite the knowledge that he was represented by counsel. Citing Syllabus Point 1 of *Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987), the State argues that the circuit court was correct in admitting the conversation because petitioner initiated the conversation, acknowledged his right to counsel, was admonished that it was not in his best interests to speak without counsel present, and spoke anyway.

Further, the State argues that petitioner has not identified any incriminating statement included in the conversation, and instead only points to an allegedly deceptive statement regarding admissions by his sister and brother-in-law. According to the State, the information that the Stires engaged in a conversation with Deputy Marshal Ayersman was presented through other testimony below without objection. The State notes that Deputy Marshal Ayersman testified, without objection,

that Kenneth Stire told him that petitioner called Ms. Stire on the night of the fire and told her he was going to set the fire in the home. Further, Deputy Marshal Ayersman testified that Ms. Stire also told him that petitioner called her and said he was going to set the house on fire on the night it happened. Therefore, according to the State, the information from the conversation that petitioner claims was prejudicial was admitted without objection absent the recorded conversation. Lastly, the State argues that even if the recorded conversation was excluded, the evidence at trial was sufficient to convict petitioner on all counts, and that the introduction of the statement constitutes harmless error.

We have previously held that “[f]or a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel.” Syl. Pt. 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987). We have further held that “[t]he 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 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994).” Syl. Pt. 2, *State v. Doonan*, 220 W.Va. 8, 640 S.E.2d 71 (2006). Upon our review of the appendix, the Court finds that it was not an abuse of discretion to admit the recorded conversation at issue. To begin, it is undisputed that petitioner initiated the conversation at issue by paging the investigating Deputy Marshal Ayersman. Second, based upon a review of the entire conversation and upon the totality of the circumstances, it is clear that petitioner knowingly and intelligently waived his right to counsel. While Deputy Marshal Ayersman did not specifically read the *Miranda* warnings to petitioner during this conversation, he did warn petitioner about speaking to him without his attorney present. Although petitioner did mention that he intended to speak with his attorney in providing a statement to the prosecutor and the marshal, it is clear that petitioner thereafter continued discussing the facts of his involvement with Deputy Marshal Ayersman.

As to petitioner’s argument that a statement by Deputy Marshal Ayersman contained in this recorded conversation and presented to the jury was unfairly prejudicial, we find no merit in this argument. The statement at issue is Deputy Marshal Ayersman’s allegedly deceptive comment that petitioner’s sister and her husband contacted Deputy Marshal Ayersman and told him that petitioner called them on the night of the fire to tell them he was going to burn the house down. As the State points out, the jury was presented with this same evidence during Deputy Marshal Ayersman’s testimony, and the record shows that no objection was raised at the time. As such, the petitioner’s argument that the jury gave the comment from the recorded statement substantial weight in assessing the evidence is without merit.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 7, 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