IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 19-0326
Circuit Court No.: 18-F-15
Jefferson County, West Virginia

KEVIN TRAVIS COSTELLO,

Petitioner.

PETITIONER'S REPLY BRIEF

JUSTIN M. COLLIN
West Virginia State Bar #10,003
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
justin.m.collin@wv.gov

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules and Statutes

REPLY ARGUMENT

A jury convicted Petitioner of DUI causing serious bodily injury after he used heroin on the drive home from work, passed out, and injured a child when he ran into another vehicle.[1] The theory of defense was that Petitioner used heroin immediately after the wreck to dispose of the illegal drugs because he was on parole.[2]

During trial, Petitioner's parole officer, Officer Lewis, testified that Petitioner gave an oral statement admitting to using heroin prior to the wreck. The State did not disclose the confession and it negated Petitioner's defense during trial. Petitioner unsuccessfully moved for a mistrial because the undisclosed confession was substantively the same as an excluded written statement. Petitioner also unsuccessfully moved for a new trial based on a discovery violation during his argument for a new trial.

In Petitioner's recidivist trial, the State introduced insufficient evidence to prove his prior Maryland conviction because it failed to introduce a judgment order. The trial court also abused its discretion by instructing the jury that Petitioner's prior convictions were felonies as a matter of law. Finally, Petitioner argued that his life sentence was disproportionate because his prior offenses, selling heroin and cocaine, were nonviolent.[3]

Respondent argued that Petitioner failed to preserve the issues during trial, that the excluded written statement was different than Officer Lewis's testimony, and that no discovery violation occurred because the State was unaware of the confession. These arguments are without merit. The record shows Petitioner made proper objections during trial, the excluded

---

[1] A.R.1768.

[2] A.R. 817.

[3] After Petitioner filed his appeal, this Court ruled that heroin is violent for recidivist purposes in *State v. Hoyle*, No. 18-0141, 2019 WL 6258349, at *2 (W. Va. Nov. 22, 2019).

statement and Petitioner's confession were both admissions to using heroin prior to the accident, and Officer Lewis's knowledge of the confession was imputed to the State.

Finally, Respondent incorrectly argued that that Petitioner was disingenuous for arguing insufficient evidence on appeal because his trial counsel referred to the prior convictions as felonies and that the character of an offense is a question of law. Respondent overlooks the maxim that courts speak only through their records. Accordingly, without an order adjudicating Petitioner guilty of a felony there is both insufficient evidence of the conviction and a jury instruction that he was convicted of a felony as a matter of law was an abuse of discretion.

ARGUMENT

I. The trial court abused its discretion by not declaring a mistrial and by not ordering a new trial after Officer Lewis testified to an undisclosed confession.

Before trial began, the trial court ordered the State to disclose Petitioner's oral and written statements.[4] The State only disclosed two written admissions that Petitioner made to Officer Lewis.[5] In Admission 1, Petitioner confessed to using heroin the day of the accident. In Admission 2, he confessed that "[he] did manifest behavior that threatened the safety of yourself or others, or that could result in your imprisonment; which caused you to be charged with DUI (narcotics) with Felony serious bodily harm."[6] The trial court admitted Admission 1 but excluded Admission 2 because it was "ambiguously phrased in the disjunctive."[7]

Prior to Officer Lewis's testimony, and because he did not want Admission 2 "coming in the back door," Petitioner requested the trial court to instruct the State and Officer Lewis not to

[4] A.R. 1204.
[5] A.R. 1346-47.
[6] A.R. 1346-47.
[7] A.R. 1695-96.

mention Admission.2 in any manner.[8] Both the trial court and the State assured Petitioner that Admission 2 would not be mentioned.[9]

Despite the trial court's discovery order and its order excluding the second written admission, Officer Lewis testified during trial that Petitioner gave an oral statement confessing to driving under the influence of heroin.[10] At the conclusion of Officer Lewis's testimony, and again after the prosecution and defense rested their cases, Petitioner moved for a mistrial based on a violation of the trial court's exclusion of Admission 2.[11] After the jury convicted Petitioner, he filed a motion for a new trial that also renewed his motion for a mistrial.[12] During Petitioner's argument for a new trial, he asserted a discovery violation based on the undisclosed confession.[13]

The trial court abused its discretion by denying Petitioner's motions for a mistrial and by denying his motion for a new trial. Officer Lewis's testimony related directly to the only disputed issue at trial: whether Petitioner used heroin before or after the wreck. And Officer Lewis's testimony was the singular most damaging evidence admitted during trial. Petitioner lost the trial the moment Officer Lewis informed the jury of Petitioner's undisclosed confession.

a. Petitioner's brief argued that the introduction of Admission 2—not the discovery violation—mandated a mistrial. Furthermore, Petitioner asserted a discovery violation during his argument for a new trial.

Respondent claimed that Petitioner presented a novel argument on appeal. Namely, that the discovery violation warranted a mistrial.[14] This is a misreading of Petitioner's brief and the record. Petitioner's appellate and trial arguments were the same: "[t]he trial court . . . abused its

[8] A.R. 329.
[9] A.R. 329.
[10] A.R. 621.
[11] A.R. 642-44.
[12] A.R. 1844-47.
[13] A.R. 860.
[14] Resp. Br. 12.

discretion by denying Petitioner's repeated motions for a mistrial in the face of manifest necessity."[15] Petitioner's mistrial motions were based solely on a violation of the trial court's exclusion of Admission 2.[16] To the extent the discovery violation was discussed, it was in response to the State's trial argument against a mistrial—a discovery related, due diligence argument—and was cited accordingly.[17]

Respondent also claimed that Petitioner did not assert a discovery violation during argument for a new trial.[18] This is again incorrect. Petitioner alleged and consistently referred to the discovery violation and its resulting prejudice during his argument for a new trial.[19]

b. The trial court abused its discretion by not declaring a mistrial after Officer Lewis testified to the excluded Admission 2.

Officer Lewis's testimony violated the trial court's exclusion of Admission 2 and required a mistrial as it negated Petitioner's defense. The trial court abused its discretion by denying Petitioner's motion.

According to Respondent, Officer Lewis's testimony and Admission 2 were distinct.[20] The former was a written statement that was "ambiguously phrased in the disjunctive."[21] The latter an oral statement. Despite this argument, each disjunctive clause in Admission 2 related directly to an admission of driving under the influence—the substance of the confession Officer Lewis testified to. The trial court's exclusion of disjunctive clauses cannot simultaneously permit the State to excise one excluded clause and admit it into evidence. Nor, as the trial court reasoned, did adding more details, such as which narcotic Petitioner used and his location on

---

[15] Pet.'s Br. 3-4, 12.
[16] A.R. 642, 674-75, 780; Pet.'s Br. 3-4, 12-13.
[17] Pet.'s Br. 13 citing A.R. 643.
[18] Resp.'s Br. 13.
[19] A.R. 860-62, 865-868, 872-73, 876, 878-79.
[20] Resp.'s Br. 18.
[21] Resp.'s Br. 18 citing A.R. 1695.

U.S. Route 340 when he used the narcotic, render Officer Lewis's testimony sufficiently distinct from Admission 2.[22]

The trial court abused its discretion by excluding a written statement but admitting a substantively similar (and undisclosed) oral statement. As such, the trial court abused its discretion by not declaring a mistrial and Petitioner is entitled to a new trial.

c. The State violated the trial court's discovery order by not disclosing Petitioner's confession.

During the hearing on his motion for a new trial, Petitioner argued that the State violated the discovery order by not disclosing his oral confession.[23] The undisclosed confession surprised Petitioner and negated his defense. The trial court abused its discretion by not granting Petitioner's motion for a new trial.

According to Respondent, there was no discovery violation as Rule 16 only requires disclosure of statements "if the state intends to use that statement at trial."[24] Therefore, because the prosecutor was unaware of the oral confession, he could not have intended to use the confession during trial.[25] And presto! No discovery violation. Respondent attempted to buttress this argument by citing *Peterson* for the proposition that Petitioner's confession to Officer Lewis was not imputed to the State as it was inculpatory rather than exculpatory.[26] This argument is wrong as a matter of law and policy.

Peterson does not hold that only exculpatory evidence is imputed to the State.[27] Instead, *Peterson* cites *Youngblood* which unequivocally holds that "[a] police investigator's knowledge

---

[22] A.R. 643-44.
[23] A.R. 860-62, 865-868, 872-73, 876, 878-79.
[24] Resp.'s Br. 15 citing W. Va. Rules of Criminal Procedure, Rule 16.
[25] Resp.'s Br. 15.
[26] Resp.'s Br. 16, fn. 2 citing *State v. Peterson*, 239 W. Va. 21, 29, 799 S.E.2d 98, 106 (2017).
[27] *State v. Peterson*, 239 W. Va. 21, 28, 799 S.E.2d 98, 105 (2017), *cert. denied sub nom. Peterson v. W. Virginia*, 138 S. Ct. 643, 199 L. Ed. 2d 545 (2018).

of evidence in a criminal case is imputed to the prosecutor."[28] This Court expanded the scope of "police investigator" to include "other members of the investigation team," including out of State forensic psychologists.[29] There is no doubt that Officer Lewis was a member of the investigation team. He was vested with arrest powers,[30] placed a parole hold on Petitioner,[31] interviewed Petitioner regarding the crime,[32] had Petitioner sign documents confessing to the crime,[33] and provided those documents to the prosecution. According to *Youngblood*, Officer Lewis's knowledge of Petitioner's confession was imputed to the prosecution.

Petitioner discussed multiple cases demonstrating that discovery violations, such as an undisclosed confession, result in new trials.[34] Respondent argued that these cases are distinguishable because they involved evidence that the prosecution was aware of.[35] As *Youngblood* demonstrates, however, knowledge of evidence by any member of the investigation team is imputed to the prosecution. As such the cases are analogous.

Respondent's argument ignored *Youngblood's* holding. Worse though, Respondent advocated for a court sanctioned method to circumvent the discovery rules and not disclose damaging evidence to the defense. If this Court adopts the Respondent's argument, it will lead to a policy between police and prosecutors of "don't ask, don't tell" concerning confessions or inculpatory forensic evidence. This will impede defense counsel's ability to evaluate a case and

---

[28] Syl. Pt. 1, in part, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007). The fact that this syllabus point continues by explaining how this edict applies to exculpatory evidence does not confine the imputing of knowledge to *Brady* violations—if a member of the investigation team has knowledge of evidence, whether exculpatory or inculpatory, its knowledge is imputed to the prosecutor.
[29] *State v. Farris*, 221 W. Va. 676, 681, 656 S.E.2d 121, 126 (2007).
[30] W. Va. Code Ann. § 62-12-19(a).
[31] A.R. 617.
[32] A.R. 618.
[33] A.R. 1346-47.
[34] Pet.'s Br. at 11-12.
[35] Resp.'s Br. at 15-17.

advise their clients and it will result in evidence surprising the defense during trial. Importantly, Respondent's position is in direct conflict with the intent of the Trial Court Rules: "to encourage complete and open discovery . . ."[36]

Petitioner's case illustrates that it is impossible to recover from the surprise of an undisclosed confession and that there must be consequences for failing to disclose inculpatory evidence that is admitted during trial. As such, the trial court abused its discretion by not granting Petitioner's motion for a new trial.

II. A second jury convicted Petitioner as a habitual offender and the trial court imposed a life sentence.

The State filed a recidivist information alleging two prior felony convictions: possession with intent to deliver cocaine in Federal Court and possession with intent to deliver heroin in Maryland Circuit Court.[37] During the recidivist trial, the State did not introduce a judgment order to prove the Maryland conviction. Instead, it introduced docket sheets, documents generated the day of Petitioner's arrest (Charge Summary, Statement of Charges, Statement of Probable Cause, Commitment Pending Hearing, and Initial Appearance Questionnaire), unsigned and handwritten Courtroom Worksheets, a partially handwritten Probation/Supervision Order, a Commitment Record directed to the Commissioner of Corrections, a Maryland Sentencing Guidelines Worksheet, and Petitioner's probation transfer request and approval.[38] The State also called Petitioner's mother[39] and girlfriend[40] to testify about his involvement in the criminal justice system.

---

[36] W. Va. Trial Court Rules, Rule 32.01
[37] A.R. 1886-88.
[38] A.R. 2149-2178.
[39] A.R. 1008.
[40] A.R. 1016.

After the parties rested, and over Petitioner's objection,[41] the trial court instructed the jury that the Federal and Maryland convictions were felony offenses as a matter of law.[42] The jury found Petitioner was a habitual offender and the trial court imposed a life sentence after rejecting Petitioner's proportionality argument.[43]

a. The State introduced insufficient evidence to prove the Maryland conviction.

The State presented insufficient evidence to prove the Maryland conviction as it did not introduce a judgment order. Respondent asserted that Petitioner was "disingenuous"[44] for arguing insufficient evidence because Petitioner's trial counsel—not Petitioner himself—acknowledged Petitioner's Maryland conviction in pretrial proportionality arguments. Respondent's suggestion that the State no longer bares the burden of proof during a recidivist trial because of arguments of counsel is without merit and an attempt to skirt the issue.

The real issue regarding the Maryland conviction was not counsel's arguments. Rather, it was the State's failure to introduce a judgment order to prove Petitioner was adjudicated guilty of a felony in Maryland. Courts speak through their records[45] and only a judgment order, or the corresponding transcript, can prove the fact of conviction beyond a reasonable doubt.[46] The State's failure to introduce a judgment order to prove Petitioner's Maryland conviction requires reversal of Petitioner's life sentence and remand for a new sentencing hearing.

---

[41] A.R. 924-28.
[42] A.R. 928, 1112-14.
[43] A.R. 2300.
[44] Resp.'s Br. 22.
[45] *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W.Va. 613, 617, 486 S.E.2d 782, 786 (W.Va.,1997) citing *State ex rel. Browning v. Oakley*, 157 W. Va. 136, 199 S.E.2d 752 (1973); Syl. Pt. 3, *Hudgins v. Crowder & Freeman, Inc.*, 156 W.Va. 111, 191 S.E.2d 443 (1972).
[46] *State v. Meadows*, 124 W. Va. 412, 20 S.E.2d 687, 688 (1942) (prior convictions proven by certified copies of judgments); see also *Comm. on Legal Ethics of W. Virginia State Bar v. Boettner*, 183 W. Va. 136, 137–38, 394 S.E.2d 735, 736–37 (1990) (order of judgment or conviction conclusive as to guilt in lawyer disciplinary proceeding).

b. The trial court abused its discretion by instructing the jury that Petitioner's prior convictions were felonies as a matter of law.

The trial court abused its discretion when it instructed the jury that Petitioner's prior convictions were felonies as a matter of law.[47] *Oyler v. Boles* established, and the evidence in this case required, that the character of Petitioner's prior convictions be submitted to the jury as an element of the offense.

Respondent argued that whether Petitioner's prior offenses were felonies was a question of law for the trial court. This argument relied on extra jurisdictional case law with no precedential value,[48] and largely ignored *Oyler v. Boles*.[49] In *Boles*, the Supreme Court of the United States held that a prior conviction is subject to collateral attack on the issue of whether the conviction is of the proper character (i.e. whether the prior conviction is a felony or misdemeanor).[50] Respondent argued that a footnote in *Boles* holds that the character of a prior conviction is a question of law.[51] However, the *Boles* footnote states that the legal issues raised in that case are questions of law.[52] These issues did not include whether the character of an offense is a question of law.

As a practical matter, a prior offense's character should never be in dispute as the State proves both character and fact of conviction with a valid judgment order. Here, there is no question that the Federal conviction was for a felony as a judgment order was admitted into evidence and any instructional error was harmless. Regarding the Maryland conviction, however, the State inexplicably failed to introduce a judgment order. The only document produced by the

---

[47] A.R. 928, 1112-14.
[48] Resp.'s Br. 22-24.
[49] Resp. Br. 24, fn. 3.
[50] *Oyler v. Boles*, 368 U.S. 448, 453–54 (1962).
[51] Resp. Br. 24, fn. 3.
[52] *Oyler v. Boles*, 368 U.S. 448, fn. 9 (1962).

State that identified the Maryland conviction as a felony was a parole transfer request form.[53] A Maryland parole officer, not a court, drafted this document. Accordingly, it was an abuse of discretion for the trial court to instruct the jury that the Maryland conviction was a felony as a matter of law.

c. Proportionality of Petitioner's life sentence.

Three weeks after Petitioner filed his brief arguing that his life sentence was disproportionate, this Court issued *State v. Hoyle*.[54] Pursuant to *Hoyle*, the threshold for a life sentence as a recidivist requires that "two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results."[55] This Court further explained that it considers possession with intent to deliver heroin "sufficiently violent, when coupled with [another] violent felony, to justify a recidivist life conviction."[56]

Hoyle squarely addressed Petitioner's proportionality argument. However, it did not provide sufficient guidance for lower courts to determine which crimes involve a threat of violence. Under this Courts ruling, selling heroin, a schedule I drug,[57] threatens violence but selling Oxycodone, a schedule II drug,[58] does not. By this logic, selling marijuana, a schedule I drug[59], threatens violence while selling Fentanyl, a schedule II drug,[60] does not.

Based on this unworkable structure, Petitioner moves this Court to reconsider it's holding in *Hoyle* and find that selling schedule I drugs is as equally nonviolent as selling schedule II

---

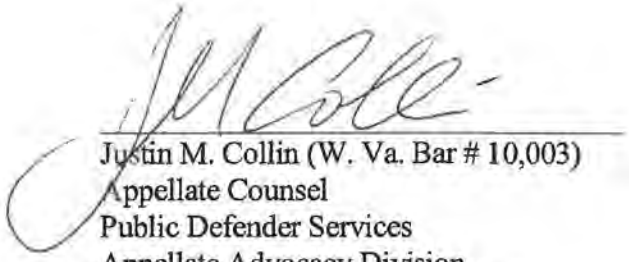
[53] A.R. 2254.
[54] *State v. Hoyle*, No. 18-0141, 2019 WL 6258349, at *2 (W. Va. Nov. 22, 2019).
[55] Syl. Pt. 12, in part, *State v. Hoyle*, No. 18-0141, 2019 WL 6258349, at *2 (W. Va. Nov. 22, 2019).
[56] *State v. Hoyle*, No. 18-0141, 2019 WL 6258349, at *12 (W. Va. Nov. 22, 2019).
[57] W. Va. Code Ann. § 60A-2-204(c).
[58] W. Va. Code Ann. § 60A-2-206(b).
[59] W. Va. Code Ann. § 60A-2-204(d).
[60] W. Va. Code Ann. § 60A-2-206(c).

drugs. In the alternative, Petitioner moves this Court to issue more guidance on what constitutes a threat of violence to avoid divergent rulings across the lower courts and piecemeal determinations in this Court.

CONCLUSION

This Court should reverse Petitioner's conviction as a habitual offender because the State introduced insufficient evidence to prove the Maryland conviction. This Court should further reverse Petitioner's conviction for DUI causing serious bodily injury and remand for a new trial.

Respectfully submitted
Kevin Castello
By Counsel:



Justin M. Collin (W. Va. Bar # 10,003)
Appellate Counsel
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, WV 25311
Phone: (304) 558-3509
Fax: (304) 558-1098
justin.m.collin@wv.gov

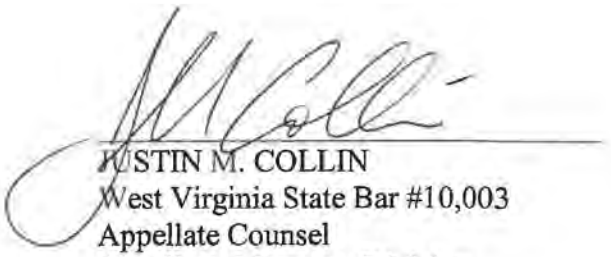
CERTIFICATE OF SERVICE

I, Justin M. Collin, counsel for Petitioner, Kevin Travis Costello, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying "*Petitioner's Reply Brief*" to the following:

Gordon L. Mowen, II
Assistant Attorney General
West Virginia Attorney General's Office
Appellate Division
812 Quarrier Street, Sixth Floor
Charleston, WV 25301

Counsel for Respondent

by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 3rd day of January, 2020.



JUSTIN M. COLLIN
West Virginia State Bar #10,003
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
justin.m.collin@wv.gov

Counsel for Petitioner