IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 19-1102
Circuit Court No.: 19-F-08
Ohio County, West Virginia

GERALD WAYNE JAKO, JR.,

Petitioner.

PETITIONER'S REPLY BRIEF

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Petitioner suffered multiple constitutional violations. The circuit court violated his right to confront his accusers by allowing the State to play his codefendant's statement to the police after she refused to testify. His right to conflict free counsel was violated by his counsel's close relationships with two of the victims in the case. And the circuit court deprived Petitioner of his right to a properly instructed jury by failing to adequately answer a question that evidenced their misunderstanding of the law.

Applying the wrong standard of review, Respondent argued that Petitioner forfeited his right to confront his accusers by causing his co-defendant's unavailability. However, Respondent failed to demonstrate that Petitioner's actions constituted significant interference with the witness and the cases Respondent relied on included aggravating factors that are absent here.

Respondent also argued that Petitioner's counsel did not have an actual conflict. Again, the cases cited by Respondent have little or no precedential value.

Finally, Respondent argued that the circuit court was correct to not answer the jury's question. However, this argument employed a literal reading of the question that ignored the implicit misunderstanding of the law. It was the court's duty to correct that misunderstanding and the failure to do so constituted plain error.

I. The circuit court violated Petitioner's Sixth Amendment right to confront his accusers.

Upon learning that his girlfriend/codefendant agreed to testify against him, Petitioner engaged in a series of phone conversations with her. The circuit court held that during these phone conversations Petitioner used "manipulation and emotions" to cause his codefendant to withdraw from her plea agreement and assert her Fifth Amendment rights when called as a

witness during Petitioner's trial.[1] The circuit court further held Petitioner's actions forfeited his right to confront his codefendant and allowed the State to play her statement to the police during Petitioner's trial.[2]

1. Standard of review is de novo

This Court has consistently held that "[a]circuit court's interpretation of the West Virginia Constitution is reviewed *de novo*"[3] and according to *Martin*, "the Confrontation Clause implicates petitioner's constitutional rights . . ."[4] Nevertheless, Respondent argued that pursuant to *Martin*, the proper standard of review is whether the circuit court abused its discretion by admitting England's statement. This argument attempted to relegate "the fundamental right to confront one's accusers" to a mere evidentiary dispute.[5] Respondent's argument also ignored cases cited in his brief that held forfeiture of the right to confrontation is a question of law that is reviewed *de novo*.[6]

2. Petitioner's phone conversations with his codefendant did not constitute abhorrent behavior that undermined the judicial system.

Petitioner's phone conversations with his codefendant did not constitute wrongdoing of such magnitude that the circuit court could forfeit his constitutional right to confrontation. Forfeiture requires "abhorrent behavior which strikes at the heart of the system of justice itself."[7]

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[1] A.R. 1364.
[2] A.R. 1347-58.
[3] Syl. Pt. 1, *Phillip Leon M. v. Greenbrier Cty. Bd. of Educ.*, 199 W. Va. 400, 401, 484 S.E.2d 909, 910 (1996), *see also State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996); Syl. Pt. 2, *State v. Bookheimer*, 221 W. Va. 720, 656 S.E.2d 471 (2007).
[4] *State v. Martin*, No. 13-0112, 2013 WL 5676628, at *2 (W. Va. Oct. 18, 2013) citing *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).
[5] Syl. Pt. 1, *State v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975).
[6] *State v. Maestas*, 2018-NMSC-010, ¶ 21, 412 P.3d 79, 84 ("Questions of admissibility under the Confrontation Clause are questions of law, which we review de novo."); *State v. Hallum*, 606 N.W.2d 351, 354 (Iowa 2000) ("Because the defendant's alleged forfeiture involves a loss of the constitutional right to confront his accusers, our review is de novo.").
[7] Resp.'s Br. 16 citing Fed. R. Evid. 804(b)(6), adv. comm. note (citation and internal quotation marks omitted).

Petitioner's behavior did not include threats, coercion, intimidation, or bribes. Nor was there a history of domestic violence between Petitioner and his codefendant that could elevate the phone conversations to conduct so abhorrent that it justified forfeiture of Petitioner's constitutional rights.[8]

Nevertheless, Respondent argued that "manipulation and emotions" fell under the "broad scope of conduct that may give rise to a forfeiture."[9] The cases cited by Respondent to support his argument are extra jurisdictional and included aggravating factors not present here: a history of domestic violence between the defendant and the declarant,[10] jail phone calls as part of an ongoing "pattern of manipulation not uncommon in domestic abuse cases,[11] the murder of a declarant by defendant's coconspirators,[12] the murder of the declarant by the defendant,[13] such obvious wrongdoing that "one would have to be 'blind' to reality to reach a contrary conclusion,"[14] and clear instructions to not testify.[15]

The circuit court erred in finding "significant interference" with a witness that justified forfeiture of Petitioner's confrontation rights.[16] The admission of the recorded statement was not harmless beyond a reasonable doubt and requires reversal of Petitioner's conviction.[17]

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[8] See *Cody v. Commonwealth*, 68 Va. App. 638, 653, 812 S.E.2d 466, 473–74 (2018).
[9] Resp.'s Br. 17 citing *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000).
[10] See *State v.* Maestas, 412 P.3d 79 (N.M. 2018); *Cody v. Commonwealth*, 68 Va. App. 638, 812 S.E.2d 466 (2018); *United States v. Jonassen*, 759 F.3d 653 (7th Cir. 2014).
[11] *Cody v. Commonwealth*, 68 Va. App. 638, 653, 812 S.E.2d 466, 473–74 (2018).
[12] *United States v. Dinkins*, 691 F.3d 358, 386 (4th Cir. 2012); *United States v. Cazares*, 788 F.3d 956, 975 (9th Cir. 2015).
[13] *United States v. Gray*, 405 F.3d 227, 243 (4th Cir. 2005).
[14] *Steele v. Taylor*, 684 F.2d 1193, 1203 (6th Cir. 1982).
[15] *State v. Hallum*, 606 N.W.2d 351, 358 (Iowa 2000).
[16] See *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005).
[17] Syl. Pt. 2, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).

II. Counsel's conflict of interest requires reversal.

During the robbery, cartons of cigarettes and over $6000 in cash were stolen from the gambling parlor.[18] Two days before trial began, Petitioner's counsel discovered a conflict of interest: he was friends with the owner of the gambling business as well as with the owner of the real estate that housed the business.[19] Counsel also vacationed with both men and performed legal work for the real estate owner.[20] Counsel informed the circuit court of the conflict the day of trial.

1. An actual conflict of interest existed.

An actual conflict of interest existed because counsel's close relationship with the financial victims of the crime adversely affected his representation of Petitioner. Counsel helped secure Petitioner's conviction and harsh sentence by eliciting damaging testimony during trial,[21] not objecting when the circuit court refused to correct the jury's misunderstanding of the law,[22] and by not presenting mitigation during sentencing. "The conflict [was] such as clearly to call in question the fair or efficient administration of justice"[23] and deprived Petitioner of "effective assistance of counsel as required by the Sixth Amendment."[24]

Respondent claimed that Petitioner's good friendship with the financial victims does not create an actual conflict of interest. To support this assertion, Respondent cited three cases—none of which have precedential value. The first case was *Rudd*—an unpublished opinion from

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[18] A.R. 1006-12.
[19] A.R. 166.
[20] A.R. 166.
[21] A.R. 991.
[22] A.R. 1151,
[23] Syl. Pt. 3, *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 116, 529 S.E.2d 354, 356 (2000) citing Syl. Pt. 1, *Garlow v. Zakaib,* 186 W.Va. 457, 413 S.E.2d 112 (1991), Syl. Pt. 2, *Musick v. Musick,* 192 W.Va. 527, 453 S.E.2d 361 (1994); see also *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 414, 624 S.E.2d 844, 851 (2005).
[24] *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 413–14, 624 S.E.2d 844, 850–51 (2005).

the Second Circuit that, pursuant to the Federal Rules, lacks precedential value and cannot be cited except in limited circumstances.[25] Moreover, *Rudd* upheld the lower court's finding that the conflict was predicated on unbelievable facts.[26]

Respondent next cited an unpublished order from the Nevada Court of Appeals for the principal that friendship does not create a conflict.[27] This one page, 651 word order, of which 138 words relate to conflicts of interest, lacked sufficient facts to analogize to Petitioner's case. Moreover, "[t]he Nevada Rules of Professional Conduct limit conflicts to those who are related to the attorney as a parent, child, sibling, or spouse."[28]

Finally, Respondent cited *Padgett*—a case wherein the petitioner appeared to waive the conflict of interest and where the Supreme Court of South Carolina held that the conflict issue was not preserved for appellate review.[29] As with the other cases, *Padgett* holds no precedential value.

2. Respondent misread *State v. Reedy*.

Reversal is also required pursuant to *Reedy* because (1) counsel did not inform Petitioner of the conflict until one or two days before trial[30] and (2) because the circuit court failed to conduct the requisite inquiry to determine if Petitioner required new counsel.[31]

Respondent countered that *Reedy* only applies when the conflict involves a family member. This narrow reading of *Reedy* misconstrues the actual holding of the case: "[t]he

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[25] *Rudd v. Scully*, 199 F.3d 1323 (2d Cir. 1999); CTA2 Rule 32.1.1(a) and (b).
[26] *Rudd v. Scully*, 199 F.3d 1323 (2d Cir. 1999).
[27] Resp. Br. 21-22 citing *Hooper v. State*, No. 76316-COA, 2019 WL 2158325, at *1 (Nev. App. May 15, 2019).
[28] *Hooper v. State*, No. 76316-COA, 2019 WL 2158325, at *1 (Nev. App. May 15, 2019).
[29] *Padgett v. State*, 324 S.C. 22, 27, 484 S.E.2d 101, 103 (1997).
[30] A.R. 167; *State v. Reedy*, 177 W. Va. 406, 352 S.E.2d 158 (1986) at fn. 1; *Id.* at Syl. Pt. 3.
[31] *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Sate ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 892, 575 S.E.2d 864, 871 (2002) citing *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir. 1982), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).

significant inquiry in [*Reedy*] is not whether actual conflict occurred because of the family relationship, but whether the potential for conflict was revealed to the appellant in a timely manner."[32] Furthermore,

> [d]isclosure of a potential conflict is mandated in order to give the defendant an opportunity to decide whether to retain other counsel or demand different court appointed counsel. An indigent criminal defendant may demand different counsel for good cause, such as the existence of a conflict of interest . . . If disclosure is not made, the defendant is denied the opportunity to make an informed and intelligent decision concerning his defense.[33]

Contrary to Respondent's argument, *Reedy* is applicable to Petitioner's case as his counsel did not disclose the conflict until one or two days before trial began.[34] Moreover, Respondent did not respond to Petitioner's argument that the circuit court failed to conduct the proper analysis to determine whether new counsel was required. Accordingly, the conviction should be reversed.

III. The circuit court erred by not correcting the juries misunderstanding of the law.

The circuit court committed plain error by refusing to meaningfully answer[35] a jury question that demonstrated its misunderstanding of the differences between first degree robbery and the lesser included offense of grand larceny: "[i]f there is belief the crime was staged, can we still find the defendant guilty of robbery in the first degree."[36] Staged robberies or "inside jobs" necessarily lack robbery's element of force and the question demonstrates the jury's fundamental misunderstanding of the law. As such, the circuit court had a duty to answer the question and "correct the jury's misunderstanding."[37]

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[32] *State v. Reedy*, 177 W. Va. 406, 411, 352 S.E.2d 158, 163 (1986).
[33] *State v. Reedy*, 177 W. Va. 406, 411, 352 S.E.2d 158, 163 (1986) (internal citations omitted).
[34] A.R. 167.
[35] A.R. 1151; the circuit court's answer was as follows: "[t]he court cannot answer this question specifically. You are to be guided solely by the application of the law already given to you to the facts as you find them."
[36] A.R. 1149.
[37] *State v. Davis*, 220 W. Va. 590, 597, 648 S.E.2d 354, 361 (2007).

Despite the circuit court's failure to ensure the jury understood the elements comprising robbery and grand larceny, Respondent argued that no error occurred.[38] To support this argument, Respondent reframed the question as an attempt to have "the judge tell [the jury] how to rule on a certain set of facts if the jury found those facts existed."[39]

Respondent is correct that courts cannot "invade the jury's province as fact finder."[40] Also, a literal reading of the jury question could arguably lead to the conclusion that the jury was asking the court how to rule on a hypothetical factual scenario. Such a reading, however, misses the real issue presented in the question. Namely, that the jury did not understand the instructions it received. These instructions correctly listed the elements of robbery and grand larceny and should have obviated the jury's question.[41] The jury put their misunderstanding of the law on full display when it sent the question to the circuit court and it was incumbent on the circuit court to correct their misunderstanding.[42]

Additionally, Respondent's narrow and literal reading of the question argued for a rule that juries must write their questions with the same specificity, accuracy, and knowledge of the law demanded of those in the legal profession. This position is unreasonable and ignored that juries are not comprised of lawyers.

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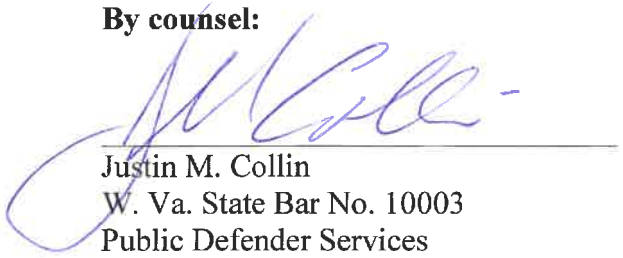
[38] See *State v. Davis*, 220 W. Va. 590, 597, 648 S.E.2d 354, 361 (2007).
[39] Resp. Br. 28.
[40] Resp. Br. 28 citing *United States v. Ellis*, 121 F.3d 908, 925 (4th Cir. 1997).
[41] A.R. 1365-68.
[42] *State v. Davis*, 220 W. Va. 590, 597, 648 S.E.2d 354, 361 (2007).

CONCLUSION

Petitioner's conviction should be reversed, and his case remanded for a new trial.

Gerald Jako
By counsel:



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CERTIFICATE OF SERVICE

I, Justin M. Collin, counsel for Petitioner Gerald Wayne Jako, Jr., 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:

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by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 21st day of May, 2020.

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