THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 20-0099

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT

VS.

JOHN THOMAS CAMPBELL
DEFENDANT BELOW, PETITIONER

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Overview

The petitioner by counsel, Eric M. Francis, wishes to incorporate all arguments in his original brief filed in this matter on or about October 1, 2020. Also, the petitioner, by counsel, is not waiving or giving up any argument that was in the original brief but not addressed in this reply brief. In addition, the petitioner, by counsel, would reiterate the request for an oral presentation on this matter, due in part, to the wide divergence between the parties on the interpretation of some basic case law.

The Circuit Court did err in permitting the State to play for the jury the petitioner's November 29, 2011 interview with Corporal Baker. Alternatively, this High Court is not precluded from considering other factors in the "totality of the circumstances", such as the petitioner's IQ score.

Before taking up the main issue of voluntariness, counsel would like to raise some preliminary matters. First, in this case, trial counsel did raise an objection to the admission to the jury of the statement in question because it was found to be voluntary. Please reference Appendix page 129 at lines eight through twenty; and Appendix page 295, lines four through eight. Second, and probably more important, this High Court can review a lower court's ruling as to voluntariness of a statement. "Since the admission of the confession amounts to constitutional error and since the confession was not a negligible part of the State's case, we find that the error was reversible. Cf. State v. Atkins, W.Va. 261 S.E.2d 55 (1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed. 2d 320 (1980)." Quoting State v. Stanley, 284 S.E.2d 367, 186 W.Va. 294 (W.Va. 1981). To put it another way, "In accord with State v. Hamrick, supra, and State v. Boyd, supra, we hold that where a person of less than normal intelligence does not have the capacity to understand the meaning and effect of his confession, and such lack of capacity is shown by evidence at the suppression hearing, it is error for the trial judge not to suppress the confession. However, where the defendant's lower than normal intelligence is not

shown clearly to be such as would impair his capacity to understand the meaning and effect of his confession, said lower than normal intelligence is but one factor to be considered by the trial judge in weight the totality of the circumstances surrounding the challenged confession. The standard on review of the trial judge's ruling on that issue was stated in the syllabus of State v. Vance, W.Va. 250 S.E.2d 146 (1978)."

The petitioner, through his counsel, wishes to reassert the arguments found in the original memorandum and requests for this Court to overturn or vacate the ruling of the lower Court. This request was once again due in great part to the fact that the original statement that was given to Corporal Baker was un Mirandized and in accordance with the United States, and especially the West Virginia, Constitutions, said statement should be seen as inadmissible. It is [illegible] inadmissible due to the fact that under current case law, the standard for determining whether the statement was voluntary is seen through the lens of "the totality of the circumstances". State v. Farley, 452 S.E.2d 50, 192 W.Va. 247 (1994). In the case at hand, the State, in its memoranda, glosses over the fact that the petitioner has an IQ of 74. (App. 468.) That fact was never brough up to the trial Court in the Motion to Suppress hearing; nor was it brought up at trial. However, under current West Virginia law such as previously cited in this section of the reply brief, the Court is obligated to look at all factors that would impact the "totality of the situation", State v. Farley, supra, when a statement is given.

The trial counsel's failure to address this issue either at the suppression motion hearing, or at trial, should constitute ineffective assistance of counsel.[1],[2] However, that does not relieve this Court from considering the petitioner's limited understanding of what was occurring and "blending" it into the totality of the circumstances. For instance, the State in its reply brief,

[1] The question of ineffective assistance of counsel discussion will be taken up in another part of this reply brief.
[2] One could consider it "newly discovered evidence" and possibly deal with the matter that way.

argues that the psychologist, Michael Sheridan, knew that the statement was voluntary and that the defendant was not in custody. Therefore, it does not matter that the petitioner has in IQ of 74. Petitioner's counsel would argue that approach, while clever, is not accurate. To argue the case that way, that means once the lower Court has made a finding that any statement was given voluntarily and/or not custodial, this high Court would have no further duty to investigate or to scrutinize said ruling.

The State suggests that Michael Sheridan agrees with the State's conclusion. Under current case law, that is simply not the case. The petitioner's counsel argues that the report by Michael Sheridan (App. 458-477.), can also be argued in this manner. Yes, the examining psychologist, under the reasonable person standard, understands that the statement was voluntary and/or non-custodial. However, the psychologist, Mr. Sheridan, goes on to state that a person with the mental capacity of the petitioner, Mr. Campbell, is highly doubtful by stating, "therefore, taking into account the totality of the situation, Mr. Campbell's competency to confess is highly questionable." (App.477) Therefore, the petitioner, by counsel, argues that when dealing with persons with limited IQ's, the standard should and must be the totality of the circumstances as it relates to a person with limited or below average IQ. To act otherwise would gut or eviscerate the legal standards put forth by this High Court in many other cases such as State v. Farley, supra; State v. Parsons, 381 S.E.2d 246, 181 W.Va. 131 (1989); and State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (W.Va. 1978).

Once one realizes that in this instance, as well as many other instances, the totality of the circumstances must be viewed by the petitioner's perspective, one must interject, concede, and deal with the fact that the petitioner, or any defendant, that has a mental limitation sees things

differently.[3] The petitioner's counsel believes that is what the examining psychologist was speaking to. It should also be noted here that this psychological examination was part of the original record and the petitioner's counsel did not go outside the court record to make this argument. Thus, once it has been established that a mental limitation is present, it is incumbent upon this body to deal with that factor in the "totality of the circumstances" in the voluntariness of the statement. Or, if the petitioner, or any defendant, with said limitation, could view his surroundings as custodial.

Once it has been established that one's mental acuity is a factor in the totality of the circumstances, and whether or not the trial counsel did adequately object to the admission of the statement to the jury, then the Court must turn its attention to other factors in the totality of the circumstances. In the case at hand, those factors include, but are not limited to, such things as a closed door, driving a defendant to the interrogation location, the police officer knowing that the defendant was a suspect before questioning, (United State v. Pierce, 397 F.2d 128 (1968)) that are meant to be fully examined under the broad umbrella of the "totality of the circumstances" when it comes to determining the voluntariness of a statement given to police officers.

The petitioner's counsel argues that when one takes into account all the factors previously mentioned in this reply brief, the original brief, as well as the case law on the matter of "totality of the circumstances", such as State v. Vance, supra, the petitioner comes closer to the argument found in State v. Parsons, supra. In that case, the defendant who it was established at the motion to suppress, had an IQ of approximately 75; and was found to give his statement voluntarily; however, the defendant in Parsons, supra, was read or told his Miranda rights on three separate occasions. As it is clear here, and not debated, the petitioner was never read his

[3] This means looking through the officer's eyes at the suppression hearing is not an accurate picture of the situation.

Miranda rights. Therefore, no one can arguably state that he understood the rights he was giving up. Therefore, it can be said, as it was said by a psychologist, that the petitioner, in this case, "probably" did not understand that the statement was voluntary and freely given. Thus, if the Court follows its standard previously set on these matters, petitioner's counsel believes that this Court must find that under the totality of the circumstances, the petitioner's statement was not freely given, and therefore inadmissible.

The Petitioner's Claim of Ineffective Assistance of Counsel is Properly Before this Court.

The State argues that this Court cannot take up the issue of ineffective assistance of counsel; and therefore, it is better served by handling it through a habeas action further on down the road. However, the State misconstrues the case law on this matter. The cases cited by the State on this matter such as State v. Brichner, No. 14-0659, 2015WL 1231005 (W.Va. Mar. 16, 2015 (memorandum decision)), does not use the term never, but the term rarely. Petitioner's counsel understands that ineffective assistance of counsel arguments are, to use the words the case law uses, "rarely" heard at an appeal level. However, "rarely" does not mean never. In this particular instance, the trial counsel for this petitioner has now been disbarred. (See Office of Disciplinary Counsel v. E. Lavoyd Morgan, Jr., No. 19-0885 (2020) and Office of Disciplinary Counsel v. E. Lavoyd Morgan, Jr., No. 19-0879 (2020).) Therefore, seeking to get additional information from his prior counsel considering the reasons for which said counsel was disbarred would be questionable. That is to say, some of the reasons the prior counsel was disbarred was due to truth and veracity matters; therefore, questioning prior counsel's motives and/or testimony would be in some sense an exercise in futility. Also, it should be stated that when the prior counsel was disbarred, it was due in part to a pattern of behavior that also included criminal

cases. Another peculiarity in trial counsel's disbarment is that it was done prior to the Office of Disciplinary Counsel finishing its process.

Therefore, the present counsel can now turn to other issues which the transcript illuminates. First, in most cases, the IQ of a defendant is usually brought up at the time of the motion to suppress because, as counsel practicing criminal law in West Virginia, we all understand that one's mental condition is a factor to be considered in the voluntariness of a statement. That was not done in the case at hand. Thus, it could be argued trial counsel fell below the customary skill standard found in cases like State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974). Also, if one as the case law suggests, looks at the transcript, the trial counsel argued issues that really did not challenge or change, the basic fundamental fact that the petitioner being over 18 years old had sexual intercourse with a person 17 years or younger while that juvenile was in the care, custody or control of the petitioner, or the facility. In fact, trial counsel in his closing statement to the jury gives an incorrect statement of the law as it relates to West Virginia Code §61-8d-5, as stated at page 367 of the Appendix; "Ladies and gentlemen, what does matter in this case? Let's clear some things up. It is not illegal for a 26-year old to have sex with a 17 year-old. That's not important." Arguably, a better way to argue the case would have been to argue that the facility had a duty of care and control of these juveniles, had a duty to screen, test, and/or be aware of an employee's mental status. This would not have been overly burdensome to the facility in question, due to the fact that as stated in the trial testimony of Mark Spangler (App.202), the facility engaged or employed psychologists that could administer basic IQ tests or batteries of exams for prospective employees. That is to say, a better argument for an acquittal in this instance, would argue that the ultimate responsibility to protect the juvenile laid with the facility and not the employee. Even the Circuit Court judge tendered

some information to that effect when he stated the following at the sentencing hearing, "I've got to say, however, that if the comments of the jury after the trial have any bearing, several jurors expressed concern or belief that perhaps the wrong person was on trial in that there obviously was a lapse in the screening process or in the supervisory process at Davis-Stuart in placing Mr. Campbell who is limited in some ways in that position." (App. 414.) Therefore, if one looks at the question of ineffective assistance of counsel, the petitioner's current counsel would not only suggest that the matters previously raised in the original brief show ineffective assistance of counsel, but also the failure of an attorney to even bring up someone's limited mental capability at the suppression hearing, or to argue a theory of the case which would allow the defendant a chance of acquittal is less than the reasonable attorney practicing in the State of West Virginia in criminal matters. To argue otherwise would be foolhardy. The other reason the petitioner's counsel brings up ineffective assistance of counsel is how the case unwound and got to the current case.[4] The petitioner has only a limited amount of time left in incarceration, approximately two years. Therefore, since there was a delay in bringing the action, through no fault of the petitioner, it seems reasonable to argue every possible violation that has occurred to insure at this time the petitioner is getting a full and fair hearing. Once again, in this situation where the trial counsel has been disbarred and the time sensitive nature of the findings, could further prejudice the petitioner, current counsel found it wise to proceed. But, on this issue, the major point is under current case law, is possible to ask this Court to review an ineffective assistance of counsel claim; and honestly, this situation is so unique, it might warrant a hearing by this Court even if it is "rarely".

[4] There are other issues that concern trial counsel: maybe failure to appeal the case timely; failure to file a new trial motion; failure to follow through on newly discovered evidence motion. Any or all of which could constitute falling below the reasonable competent attorney standard.

It is quite possible there is cumulative error in this case.

Whether you approach this appeal by way of a mistake on the voluntariness ruling, improper jury instructions, ineffective assistance of counsel deviations, or cumulative error, one this is for certain, one of the least culpable persons involved in this case is the petitioner with a valid IQ of 74.

CONCLUSION

For the reasons expressed above, this case warrants reversal. As pointed out, this Court must address the voluntariness of the State's issue with the "new" information of the petitioner's IQ under current case law. Then, the next question is this Court must address the failure of the Court system to accurately and promptly address the "totality of the circumstances" surrounding the statement in question. Does the fault or omission lie with the Court, i.e. ruling, jury instruction, or does the fault or omission lie with petitioner's trial counsel, i.e. ineffective assistance of counsel; a disbarred attorney? Petitioner's current counsel does not care where the fault or omissions lie. He only hopes to correct the situation. In trying to do that, hopefully current counsel has provided this Court with several options to obtain this goal. To state this another way, is to make the court system a harsh world for those persons with limited IQ, including the petitioner.

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CERTIFICATE OF SERVICE

I, Eric M. Francis, counsel for the Petitioner named herein, do hereby certify that a true copy of the Petitioner's Reply Brief, has been previously mailed to the following persons at their last known addresses on this the 18th day December 2020.

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