IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-184

STATE OF WEST VIRGINIA
Respondent

v.

LAWRENCE DAVVON FOYE
Petitioner

PETITIONER'S REPLY BRIEF

Appeal from the
Circuit Court of Kanawha County
Case No. 18-F-306

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This appeal is based on claims that the Petitioner's parole was violated under an improper burden of proof and that the evidence presented at the revocation hearing was inadequate. The Petitioner's arguments are constitutionally based because he claims that "reasonable cause" is an inadequate standard that does not comply with due process and that the hearsay evidence used at the hearing denied him the Sixth Amendment right to cross-examination. The Respondent's brief takes the position the circuit court used the proper burden of proof for probation and parole revocation and that the evidence at the hearing was sufficient. Full argument in this case is necessary to resolve these constitutional issues which would apply to all revocation hearings held in this State.

Reasonable Cause is not a constitutionally adequate burden of proof for a parole revocation

Mr. Foye's appeal is based on the precedent of this Court setting clear preponderance of the evidence as the burden of proof for parole revocation. The Respondent's brief says that "reasonable cause" is the burden of proof set by the legislature in W.Va. Code § 62-11B-12. *Sigman v. Whyte,* was a constitutionally based decision. Reasonable cause is not a constitutionally adequate burden of proof for a revocation of parole. The United States Supreme Court established that due process applies to probation and parole revocation in *Morrisey v. Brewer* and *Gagnon v. Scarpelli.* "Even though the revocation of parole is not a part of the criminal prosecution, we held that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process." *Gagnon*, 411 U.S. 778, 781, 93 S. Ct. 1756, 1759, 36 L. Ed. 2d 656 (1973). The due process considerations were described at length in *Morrissey*.

> This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of

> erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

408 U.S. 471, 483–84, 92 S. Ct. 2593, 2601–02, 33 L. Ed. 2d 484 (1972)(internal citations omitted).

Louk v. Haynes and *Sigman v. Whyte* followed the requirements of *Morrissey* and *Gagnon* establishing the due process requirements for probation and parole revocation in West Virginia. *Sigman* explains why a preponderance of the evidence standard is required:

> In order to allay fears that the revocation proceeding will be abused by the law enforcement authorities we require that the evidence against the probationer be proven by a clear preponderance of the evidence.
>
> In requiring that the evidence be proven by a clear preponderance we have exceeded the standard of a preponderance of evidence which has been recommended by the ABA Project on Standards for Criminal Justice, Standards Relating to Probation, s 5.4(a)(iii), at 65 (Approved Draft 1970).

Sigman v. Whyte, 165 W. Va. 356, 362, 268 S.E.2d 603, 607 (1980).

Preponderance of the evidence is the predominant burden of proof for probation violation hearings. It is the required standard in federal court and the majority of state courts. *Harris v. United States*, 612 A.2d 198, 205 n.16 (D.C. 1992). The *Sigman* opinion intentionally required the burden of clear preponderance over mere preponderance.

This Court should reject the "reasonable cause" standard stated in § 62-11B-12 not because it conflicts with prior rulings, but because such a standard would be inadequate to protect a defendant's due process rights.

The burden of proof established in *Sigman* is constitutionally required in the same manner as the procedural requirements detailed in *Louk.* The procedural requirements in *Louk*

are not included in W.Va. Code § 62-12-10. But the statute did not abrogate the *Louk* decision. The statute is read in compliance with *Louk* and should be read in compliance with *Sigman.*

Violation of the law by the Parolee must be proved

Mr. Foye was charged with violating the law of the State of West Virginia by committing a murder. (A.R. 17) The Respondent's brief does not claim that the evidence at the revocation hearing proved that he committed a murder, whether under a preponderance or "reasonable cause" standard. The brief does not claim that Mr. Foye was an accessory to the murder under West Virginia law or that he was part of a conspiracy to commit murder.

The State's brief consistently uses the phrasing "involved in a murder." No provision of West Virginia law includes a category of being "involved" in a crime. The law of accessories is broad and detailed. W.Va. Code §§ 61-11-6, 7, 61-10-31. These statutory provisions conform with traditional common law. The purpose of these laws is to provide an appropriate procedure to identify, prosecute, and punish any person who is culpable in the commission of a crime. If a person does not fit in that framework, a Court cannot make a finding that they violated the law in violation of their probation.

The State cites *State v. Ketchum* for the proposition that a probation revocation proceeding "involves a factual determination that an offense has been committed which imparts the conclusion that the rehabilitative and other purposes behind probation have failed." The cited paragraph continues. "Because a determination of criminal guilt is not involved, the standard of proof in a probation revocation hearing is by a clear preponderance of the evidence and not proof beyond a reasonable doubt." 169 W.Va. 9, 12, 289 S.E. 2d 657, 658-59 (1981). *Ketchum* involved a probationer who had directly committed the crime of passing bad checks. He was a principal in the first degree. There was no question of accessory liability or theory of the case.

The quoted language that the proceeding involves a factual determination that an offense has been committed means that the offense was committed by the probationer. Proof that an offense was committed might include commission the offense as an accessory, but that proof would need to be clearly presented to the court and meet the required burden of proof.

The State's brief does not cite any authority for the proposition that "Because Petitioner's revocation hearing is not a criminal prosecution, it is unnecessary for the State to provide a theory of the criminal prosecution at Petitioner's revocation hearing." The allegation is that Mr. Foye committed a crime. There has to be a theory of prosecution and the parolee must have an opportunity to respond to the State's theory of guilt. This is especially true in Mr. Foye's case when he was not physically present at the time of the shooting and did not fire a shot.

Mr. Foye violated his parole by contact with a disreputable person at the time of his arrest

The petition for revocation of parole alleges that Mr. Foye had contact with a disreputable person, Malik Hawk, "as evidenced by Malik Hawk being in the car with the defendant when he was arrested for 23-M06F-0064." This arrest occurred on January 27, 2023. The alleged murder occurred on November 30, 2022. Mr. Foye did not contest the allegation in the petition or cross-examine the probation officer witness.

The State's brief claims "Again, Petitioner chose not to rebut the State's allegation that he had contact with a disreputable person when Petitioner was in a vehicle with Hawk at the scene of the murder. The State's evidence at the revocation hearing established reasonable cause to believe that the Petitioner violated his parole by contacting a disreputable person, Malik Hawk, in the context of a murder." The parole violation petition alleged that Mr. Foye was with the disreputable Hawk two months after the alleged murder, not "at the scene of the murder" or "in the context of a murder."

"Evidence at a probation revocation hearing must be confined to relevant testimony concerning written charges of which the accused has notice." Syllabus Point 15, *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976). Mr. Foye challenged the allegations that he was present at, or involved in a murder in cross-examination of Officer Adkins and argument to the court.

The Probation Revocation was based entirely on Hearsay

The State claims that the probation revocation was not based entirely on hearsay and provides examples of non-hearsay evidence. These examples will be quoted in full and addressed in turn:

1. Detective Brandon Adkins testified that cooperating witness, who was present with Petitioner throughout the events that led up to the murder, identified Petitioner as a participant in the crime.

That is hearsay.

2. Corroborating the information from the cooperating witness, the State presented evidence that Petitioner is charged with murder in Cabell Counry, and the magistrate court found probable cause to bind this case over to the grand jury.

That is not evidence of any kind.

3. In addition, Adkins testified "We located a vehicle that was used during the incident and at that time Foye was identified as the individual that was supposed to have that vehicle"

Upon cross-examination, the source of this information was the hearsay informant.

4. Adkins also viewed surveillance video from the scene of the murder showing a black SUV the description of the Chevrolet Blazer that Petitioner drove to Huntington.

The hearsay informant was the source connecting Foye to the SUV.

5. Further petitioner did not contest the State's allegation that he was in contact with his co-defendant in the murder case, Malik Hawk. Petitioner's contact with Hawk corroborates the State's theory that Petitioner was involved in the murder, because Petitioner never stated that he had contact with Hawk on some other occasion.

The parole violation alleged that he had contact with Hawk on some other occasion. The contact was on some other occasion, specifically January 27, 2023. This was two months after the alleged murder.

6. Moreover Adkins reviewed subscriber information obtained from Petitioner's cell phone company, which reflected that Petitioner's cellphone "was in Huntington around the time of the incident." Petitioner's cellphone records are admissible under the business records exception to the hearsay rule.

Whether such records may have been admissible, they were not admitted. They were not presented to the Court. They were not provided to the Petitioner. There was no opportunity to cross-examine any witness regarding the content or accuracy of these records. Revocation hearings require "disclosure to the probationer of evidence against him." Syllabus Point 12 *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976)

7. And the Cabell County Magistrate Court held a preliminary hearing and found probable cause to bind Petitioner's murder case over to the grand jury.

That is still not evidence.

The Constitution requires certain procedural protections in revocation proceedings. This includes "the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)" Syllabus Point 12, *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976). The petitioner has cited *State ex rel Jones v. Trent*, 200 W. Va. 538, 490 S.E.2d 357 (1997)(per curiam) and *Lilly v. Virginia* 527 U.S. 116, 119 S. Ct. 1887 1899 (1999) for their holdings that hearsay statements of accomplices are inherently unreliable and that admission of such statements is a denial of the constitutional right of cross-examination. The reply brief states. "But *Lilly* involves hearsay admitted in a criminal prosecution, not in a probation revocation. Thus, *Lilly* and its concern over the admission of unreliable hearsay is inapposite because a revocation hearing is not a trial, and hearsay is admissible in revocation hearings." *Lilly* is a confrontation clause case. The confrontation clause applies to parole revocation hearings. *Jones v. Trent* is a probation revocation confrontation clause case. Even if there is a wish for revocation hearings to be a hearsay free-for-all because the "rules of evidence don't apply," they have been recognized as a critical proceeding involving

potential deprivation of liberty where due process protections will prevent an accused from being incarcerated on inadequate evidence.

The State cites an unpublished Sixth Circuit memorandum opinion for the proposition that a probation officer's testimony based upon an arrest warrant constitutes sufficient evidence for a court to find Shakir engaged in criminal conduct and revoked his supervised release. *United States v. Shakir*, 574 Fed.Appx. 712 (6th Cir. 2014). This case does not provide persuasive grounds to find that a parole violation can be based on inadequate evidence. *Shakir* cannot be squared with the constitutional protections established by this Court for parole violation proceedings.

Mr. Foye's technical violations of parole should have resulted in a graduated sanction

The State's brief claims that Mr. Foye violated a "special condition of probation" under W.Va. Code § 62-12-10(a)(1)(C) by having contact with a disreputable person. This would take him outside of the graduated sanction provisions of subsection (a)(2). The Court's order does not make a finding that paragraph three constitutes a special condition of probation under this statute.

The no-contact provision is not "a special condition of probation." It is a standard condition ordered in every probation, parole, and home incarceration case in Kanawha County. The parole order in this case is a form order, as identified at the footers on each page. (A.R. 14-16) The intent of the graduated sanction statute was to separate standard technical violations from the more serious violations which should result in a penitentiary sentence. Contact with disreputable persons is the prototypical technical violation. *Gagnon v. Scarpelli* alleged that "(Scarpelli) has associated with known criminals" 411 U.S. at 780, 93 S.Ct. at 1758. In *Sigman v. Whyte* it was a condition of probation that "You shall refrain from frequenting unlawful and disreputable places or consorting with disreputable persons." 165 W. Va. at 357 n.1, 268 S.E.2d

at 605. This is such a standard boilerplate condition of probation that it is phrased in archaic language which has been repeated without change in successive forms over the years.

The Petitioner did not contest the technical violations at the hearing or on this appeal. These technical violations should have resulted in a jail sanction and reinstatement to parole, not a penitentiary sentence.

Conclusion

The State claims that W.Va. Code §§ 62-12-10 and 62-11B-12 abrogated the holding of *Sigman* requiring the burden of proof of clear preponderance of the evidence in parole violation cases. The "reasonable cause" language contained in these statutes would result in a denial of due process rights in violation proceedings. The inadequate evidence at the hearing in this case demonstrates the danger of lowering the burden of proof.

Respectfully submitted

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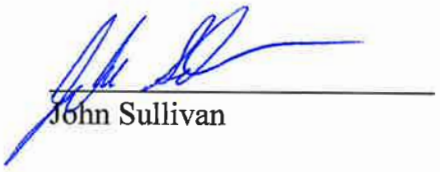
CERTIFICATE OF SERVICE

I, John Sullivan, certify that on August 16, 2023 a copy of the Petitioner's Reply Brief was served on respondent State of West Virginia, Jason Parmer, Assistant Attorney General, by use of the West Virginia Supreme Court of Appeals e-filing system.



John Sullivan