

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23-7

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**STATE OF WEST VIRGINIA,
RESPONDENT**

vs.)

**MONICA HARTWELL,
DEFENDANT, PETITIONER**

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The Petitioner Monica Hartwell contends that the 9th Judicial Circuit Court in Mercer County (hereinafter “Mercer County Circuit Court”) erred by denying the Petitioner’s Motion In Limine/Motion to Suppress to prohibit the Respondent the State of West Virginia’s (hereinafter “the State”) witness, West Virginia State Trooper S.K. Weikle (hereinafter “Trooper Weikle”), from testifying as to what the Petitioner told him when she responded to his question while in his custody.

The Petitioner filed a Motion In Limine/Motion to Suppress to prohibit Trooper Weikle from testifying as to the Petitioner’s response arguing first that the Petitioner’s response was hearsay under the West Virginia Rules of Evidence and second that the question from Trooper Weikle was a custodial interrogation, the Petitioner was in Trooper Weikle’s custody and had not been advised of her Miranda Rights at that time as required under the Fifth Amendment to the United States Constitution.

The Mercer County Circuit Court denied the Petitioner’s motions and permitted Trooper Weikle to testify at trial as to the Petitioner’s incriminating response to his custodial interrogation.

STATEMENT OF THE CASE

On July 26, 2020, the Petitioner was arrested at home for the offense of Murder in the First Degree. Witnesses testified that the Defendant shot her boyfriend Michael Walker while he was sitting on the front porch of the home; however, the witnesses did not witness the shooting and only heard a gunshot.

The State’s witness Brian Smith, who lived with the Petitioner, testified that he last saw the Petitioner and Michael Walker on the porch and that when he exited the back door of the house a few minutes later he heard a gunshot. (P 211-221). Mr. Smith testified that after hearing

the gunshot he walked around the house and saw Michael Walker's dead body lying in the bushes. Brian Smith, however, could provide no testimony as to how Michael Walker was shot or who had shot him. (Id.).

The State's witnesses Craig Young (P 342-348) and Taresa Horne (P 241-255), who lived next door to the Petitioner, testified that they both last saw the Petitioner and Michael Walker on the porch and that the Petitioner told them that Mr. Walker would soon be leaving. Craig Young testified that he did not think that the Petitioner's comment about Mr. Walker was unusual as Mr. Walker suffered from a mental illness and routinely left the Petitioner's house to seek mental health treatment. (P 347-348). Craig Young (P 342) and Taresa Horne (P 241-255) spoke to the Petitioner and Mr. Walker briefly, and walked back into their home to complete installing some wood trim.

A few minutes later Mr. Young and Ms. Horne heard a gunshot and walked outside and saw Brian Smith running toward them yelling that the Petitioner had shot Mr. Walker. (Id.). Thereafter, Mr. Young and Mr. Smith contacted Mercer County 911 and advised the operator that there had been a shooting at the Petitioner's residence. (Id.). Craig Young and Taresa Horne could provide no testimony as to how Michael Walker was shot or who had shot him.

Shortly after contacting Mercer County 911, law enforcement officers from the West Virginia State Police and the Mercer County Sheriff's Department responded. Trooper Weikle was one of the officers of the West Virginia State Police who responded. Upon arriving at the Petitioner's home Trooper Weikle was advised by Craig Young that the Petitioner had shot Michael Walker. (P. 160). Thereafter, the West Virginia State Police and the Mercer County Sheriff's Department secured the Petitioner's home.

The Petitioner was located in her house and was removed without incident. (P160 & 162). Trooper Weikle secured the Petitioner on the front porch of the home and began to take her to his vehicle. (P 166). Before they left the front porch Trooper Weikle stopped the Petitioner and asked “where’s the gun”. (P 167). At that time, the Petitioner was handcuffed, surrounded by officers of the West Virginia State Police and Mercer County Sherriff’s Department, was being escorted by Trooper Weikle to his vehicle to secure her further, was not free to leave, had not been advised of her Miranda Rights and was clearly in Trooper Weikle’s custody. (P 162). The Petitioner answered Trooper Weikle’s question making an incriminating statement that the gun was located on the couch in her home. (P 167).

At trial, the jury was not presented with any substantial evidence upon which they could justifiably find the Petitioner, beyond a reasonable doubt, committed the crime of murder. The State presented no testimony from any eye witnesses who saw how the alleged crime occurred or who was involved. The Petitioner’s fingerprints were not found on the firearm used in the crime. (P 180). The Petitioner had no blood on her body or her clothing linking her to the shooting despite the fact that the State of West Virginia’s Medical Examiner testified that the distance between the barrel of the gun and the victim was a less than two feet away. (P 180 & 264). The Petitioner did not have any gunshot residue found on her hands despite the fact that the crime involved the shooting of a firearm. (P 225).¹

The State’s only evidence that the Petitioner committed the crime was testimony from Brian Smith, Craig Young and Taresa Horne, that they last saw the Petitioner and Michael Walker on the porch and then heard a gunshot at which time they found Michael Walker’s dead body lying in the bushes. The State’s only evidence linking the Petitioner to the firearm that

¹ The State’s witness Brian Smith was the only person found to have had gunshot residue on his hands. (P 365).

killed Michal Walker came from Trooper Weikle's testimony that she knew its location when he questioned her while she was in his custody and had not been advised of her Miranda Rights.

On August 11, 2022, a Mercer County Jury found the Petitioner guilty of Murder in the Second Degree for the murder of Michael Walker.

SUMMARY OF ARGUMENT

The Petitioner contends that the Mercer County Circuit Court erred by denying the Petitioner's Motion In Limine/Motion to Suppress to prohibit Trooper Weikle from testifying as to what the Petitioner told him about the location of the firearm because first, the Petitioner was in Trooper Weikel's custody and second his testimony was hearsay.

First, at the time the Petitioner was questioned by Trooper Weike she was in his custody. At the time the Petitioner was asked the question "where is the gun" she was handcuffed, surrounded by law enforcement, being escorted by Trooper Weikle to his vehicle to secure her further, and was clearly not free to leave. A "custodial interrogation" is defined as **any questioning** initiated by law enforcement officers after a person has been taken into custody or a person has otherwise been deprived of his freedom in any significant way. Miranda v. Arizona, 384 U.S. 436, 445, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Additionally, when a "custodial interrogation" is performed the person being interrogated must be advised of four (4) basic and fundamental rights before any statement and these include the caution: (1) that the suspect has a right to remain silent; (2) that anything the suspect says can be used against them in court; (3) that the suspect has the right to the presence of an attorney; and (4) that the suspect has the right to have an attorney appointed before submitting to questioning if they cannot afford one. Id. at 471-475. At the time of the question and answer, the Petitioner had not been read her Miranda Rights.

Second, what the Petitioner told Trooper Weikle about the location of the firearm was clearly hearsay under Rule 801 and Rule 802 of the West Virginia Rules of Evidence and not admissible.

Accordingly, the Petitioner's Motion In Limine/Motion to Suppress to prohibit Trooper Weikle from testifying as to what the Petitioner told him about the location of the firearm should have been granted and Trooper Weikle should have been prohibited from testifying at trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The principle issue in this case has been authoritatively decided by Supreme Court of Appeals of West Virginia (hereinafter "West Virginia Supreme Court"). Oral argument under Rule 18(a) of the West Virginia Rules of Appellate Procedure is not necessary unless the West Virginia Supreme Court determines that other issues arising upon the record should be addressed. If the West Virginia Supreme Court determines that oral argument is necessary, this case is appropriate for a Rule 19 of the West Virginia Rules of Appellate Procedure argument and disposition by memorandum decision.

ARGUMENT

Standard of Review

The Petitioner filed a Motion In Limine/Motion to Suppress to prohibit Trooper Weikle from testifying as to the Petitioner's response arguing first that the Petitioner's response was hearsay under the West Virginia Rules of Evidence and second that the question from Trooper Weikle was a custodial interrogation, the Petitioner was in Trooper Weikle's custody and had not been advised of her Miranda Rights at that time as required under the Fifth Amendment to The United States Constitution. U.S. CONSTITUTION, AMEND. V.

This Honorable Court held in Syllabus point 3, of State v. Stuart 192 W. Va. 428, 452 S.E.2d 886 (1994), that on appeal the proper standard of review regarding suppression

determinations are reviewed *de nova*. Likewise, this Honorable Court held in Syllabus point 4, of State v. Radoussakis, 204 W. Va. 58, 511 S.E.2d 469 (1998), that on appeal the proper standard of review regarding evidentiary issue are reviewed under the abuse of discretion standard.

1. At the time the Petitioner was asked the question “where is the gun” she was in Trooper Weikle’s custody, being interrogated and was required to be advised of her Miranda Rights.

The first issue before this Honorable Court is whether Trooper Weikle’s question “where is the gun” to the Petitioner was a custodial interrogation which required the Petitioner to be advised of her Miranda Rights.

This Honorable Court held in Syllabus point 1, of State v. Preece, 181 W. Va. 633, 383 S.E.2d. 815, 820 (1989), “Miranda warnings are required whenever a suspect has been formally arrested or subjected to custodial interrogation, regardless of the nature or severity of the offense.” The United States Supreme Court in Miranda v. Arizon held that law enforcement is required to “inform a custodially detained suspect, of his constitutional rights under the fifth and sixth amendment to the Constitution of the United States before attempting to interrogate.” Id. “The warnings that must be provided occur when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Id. (quoting Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602 1612, 16 L.Ed.2d 694, 706 (1966).

A “custodial interrogation” is defined as **any questioning** initiated by law enforcement officers after a person has been taken into custody or a person has otherwise been deprived of his freedom in any significant way.” Id. Likewise, when a “custodial interrogation” is performed the person being interrogated must be advised of four (4) basic and fundamental rights before any statement and these include the caution: (1) that the suspect has a right to remain silent; (2) that anything the suspect says can be used against them in court; (3) that the suspect has the right to

the presence of an attorney; and (4) that the suspect has the right to have an attorney appointed before submitting to questioning if they cannot afford one. Id. at 471-475.

This Honorable Court held in Syllabus point 1, of State v. Middleton, 640 S.E.2d 152, 220 W.Va. 89 (W. Va. 2006), “a trial court's determination of whether a custodial interrogation environment exists for purposes of giving Miranda warnings to a suspect is based upon whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest.” Additionally, this Honorable Court listed a number of factors that a trial court should consider when making a determination of a whether a custodial interrogation environment exists, stating:

The factors to be considered by the trial court in making a determination of whether a custodial interrogation environment exists, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest. Syllabus point 2, of State v. Middleton, 640 S.E.2d 152, 220 W.Va. 89 (W. Va. 2006).

In this case before this Honorable Court there can be no question that a reasonable person in the Petitioner’s position, would have considered their freedom of action curtailed to a degree associated with a formal arrest. Shortly after Mercer County 911 was contacted about the shooting, law enforcement officers from the West Virginia State Police and the Mercer County Sherriff’s Department responded. Trooper Weikle was one of the members of the West Virginia State Police who responded.

Upon arriving at the Petitioner’s home Trooper Weikle was advised by Craig Young that the Petitioner had shot Michael Walker. (P 160). Thereafter, a number of officers from the West Virginia State Police and the Mercer County Sherriff’s Department secured the Petitioner’s home and made contact with the Petitioner who was in the home. (P 161). The Petitioner was then

removed from the home by officers of the West Virginia State Police and the Mercer County Sheriff's Department. (P 160-162). At that time, the Petitioner was surrounded by multiple members of the West Virginia State Police and the Mercer County Sheriff's Department.

Trooper Weikle then secured the Petitioner on the front porch of the home with handcuffs. (P 162 & 166). At that time, the Petitioner was physically restrained by law enforcement, surrounded by law enforcement and clearly not free to leave.

Trooper Weikle then began to escort the Petitioner to his vehicle in order to restrain her further. (P164). Before Trooper Weikle and the Petitioner left the front porch to go to Trooper Weikle's vehicle he stopped the Petitioner and asked "where's the gun". (P 166-167). Clearly, based on the factors discussed by this Honorable Court in State v. Middleton, any reasonable person in the Petitioner's position would have considered their freedom of action curtailed to a degree associated with a formal arrest and in the custody of law enforcement.

Furthermore, there can be no question that the Petitioner when asked by Trooper Weikle "where is the gun" was being interrogated. The United State Supreme Court in Rhode Island v. Innis, 446 U.S. 291, 301-302, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), held that:

We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. ***That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.*** The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. ***A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.***

Pursuant to Miranda v. Arizona Trooper Weikle was required to advise the Petitioner of her Miranda Rights before he was permitted to ask any questions of the Petitioner that could clearly incriminate her to the crime. Trooper Weikle did not advise the Petitioner of her Miranda Rights and while in custody the Petitioner answered Trooper Weikle telling him that the gun was on the couch in her home. (P 167). Clearly, Trooper Weikle knew that the answer to his question could be an incriminating statement. The State called Trooper Weikle at trial for the sole purpose of testifying that the Petitioner had knowledge as to the location of the murder weapon clearly using the Petitioner's answers to infer to the jury that the Petitioner murdered Michael Walker because she had knowledge as to the location of the gun.

The United States Supreme Court held in Miranda v. Arizona, that:

the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id., 384 U.S., at 444, 86 S.Ct., at 1612. Those safeguards included the now familiar Miranda warnings namely, that the defendant be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires"—or their equivalent. Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In this case, the State cannot demonstrate that the Petitioner was provided her procedural safeguards effective to secure the privilege against self-incrimination because she was never given her Miranda Right warnings. The Mercer County Circuit Court erred by denying the Petitioner's Motion In Limine/Motion to Suppress to prohibit Trooper Weikle from testifying as to what the Petitioner told him about the location of the firearm while being subject to a custodial interrogation.

2. Trooper Weikel's testimony as to the Petitioner's response to his custodial interrogation asking "where is the gun" was hearsay and not permitted under the West Virginia Rules of Evidence.

The second issue before this Honorable Court is whether the statement from the Petitioner regarding the location of the gun in response to Trooper Weikel's custodial interrogation was hearsay under the West Virginia Rules of Evidence.

Pursuant to Rule 801 of the West Virginia Rules of Evidence:

"Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. W. VA. R. EVID. 801(2021).

In this case before this Honorable Court, the Petitioner did not make the statement regarding the gun while testifying at trial or any hearing. Likewise, the State was clearly offering the Petitioner's answer to Trooper Weikel's question to prove the matter asserted that the Petitioner committed the crime because she knew the location of the firearm used to murder Michael Walker. Clearly, the statement fits the definition of hearsay under Rule 801 and pursuant to Rule 802 of the West Virginia Rules of Evidence is not admissible. W. VA. R. 802(2021).

CONCLUSION

At the time the Petitioner was asked the question "where is the gun" she was in the State's custody, being interrogated and was required to be advised of her Miranda Rights. The Petitioner was handcuffed, surrounded by law enforcement, being escorted by Trooper Weikel to his vehicle to secure her further, and was clearly not free to leave. "A "custodial interrogation" is defined as **any questioning** initiated by law enforcement officers after a person has been taken into custody or a person has otherwise been deprived of his freedom in any significant way." Miranda v. Arizona, 384 U.S. 436, 445, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In this case, the State cannot demonstrate that the Petitioner was provided her procedural safeguards effective to secure the privilege against self-incrimination because she was never

given her Miranda Right warnings. The Mercer County Circuit Court erred by denying the Petitioner's Motion In Limine/Motion to Suppress to prohibit Trooper Weikle from testifying as to what the Petitioner told him about the location of the firearm while being subject to a custodial interrogation.

Likewise, Trooper Weikel's testimony as to the Petitioner's response to his custodial interrogation asking "where is the gun" was also hearsay and not permitted under the West Virginia Rules of Evidence. Clearly, the statement fits the definition of hearsay under Rule 801 and pursuant to Rule 802 of the West Virginia Rules of Evidence is not admissible. W. VA. R. 802(2021).

The Petitioner respectfully requests that this Honorable Court reverse the Mercer County Circuit Court's ruling granting the Petitioner's Motion In Limine/Motion to Suppress prohibiting Trooper Weikel's testimony regarding the Petitioner's response to his question "where is the gun" and order the Mercer County Circuit Court to grant the Petitioner a new trial.

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CERTIFICATE OF SERVICE

I, Ryan J. Flanigan, attorney for Petitioner hereby certify that on June 28, 2023, I served the **PETITIONER’S BRIEF** and **APPENDIX** upon Respondent counsel by E-filing as follows:

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