

SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Nov 02 2023
09:30AM EDT
Transaction ID 71295461

**State of West Virginia,
Plaintiff Below, Respondent**

vs.

No. 23-272

**Heath Allen Rose,
Defendant Below, Petitioner**

**Appeal from the Order of the Circuit
Court of Mingo County
(Court Case No. 22-F-135)**

PETITIONER'S REPLY BRIEF

Joseph H. Spano, Jr.
Pritt & Spano, PLLC
1204 Virginia St. E.
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No.: 11373
jspano@yourwvlawfirm.com

TABLE OF CONTENTS

REPLY ARGUMENT	4
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CASES AND AUTHORITIES

CASES

State v. Persinger, 169 W. Va. 121, 123, 286 S.E.2d 261, 264 (1982)).....5
Syl. Pt. 1, State v. Crouch, 178 W. Va. 221, 358 S.E.2d 782 (1987)).....5

RULES

Rule 1.9(c)(1) and (2) of the W.Va. Rules of Professional Conduct.....8

I. REPLY ARGUMENT

A. **The Court incorrectly accepted the Petitioner's stipulation to allowing in the defendant's statement without having a hearing on the voluntariness of his statement to police.**

The respondent first argues in error that the petitioner failed to object to the statement being stipulated to and therefore, he waives his argument on appeal. In the present case, this is not true.

Trial Counsel Simpkins stated to the trial judge at the suppression hearing on November 29, 2022, that the statement was voluntary and there needed to be no suppression hearing (HR_090). Specifically, Simpkins stated:

“Your Honor, I had a brief discussion with my client off the record and he has told me that the statement was voluntarily given without any type of coercion or duress. He voluntarily gave it, and that he would like to go ahead and just stipulate to those matters.”

(HR_090). Petitioner's counsel, Simpkins, did said that after a “brief discussion” with his client, the petitioner was choosing to stipulate to allowing the statement in. First, the record is clear that the statement was not voluntarily withdrawn by the Petitioner until first questioned again by the police after requesting an attorney. Second, petitioner's counsel waived the suppression hearing on the statement after only a brief conversation and not full disclosure to the petitioner who is not an attorney. Third, petitioner's counsel was inept in the law and didn't even know that a Notice of Appeal had to be filed within 30 days after the final order and told the petitioner that he had 120 days to file it (*See Motion to File Out of Time*).

The petitioner did not in fact invite the error or waive the objection to the error. Had his attorney fully described the suppression hearing, the voluntariness of the statement's legal requirements and the facts surrounding the statement; the petitioner would surely have had the

hearing and the statement would not have been allowed in. This statement was prejudicial to him in leading to his conviction. These same facts would also prevent the respondent from arguing the “waiver” requirement as well.

Second, the respondent argues that the petitioner cannot meet the first two requirements of the plain error doctrine. This is not the case and the petitioner has proven all the elements of the plain error doctrine. There was a plain error in allowing in a statement of a defendant, through a waiver, after petitioner’s counsel stated he had a “brief conversation” with the petitioner about the suppression hearing and the statement. “Waivers of counsel must not only be voluntary but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *State v. Persinger*, 169 W. Va. 121, 123, 286 S.E.2d 261, 264 (1982).

The record clearly shows that Simpson’s own statements to the trial judge show that the “brief conversation” with the petitioner was not knowing and intelligent waiver.

Third, the respondent argues that the petitioner knowingly and intelligently recanted his request for counsel. The petitioner’s brief is clear on this issue as to why this is not true. "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." *Syl. Pt. 1, State v. Crouch*, 178 W. Va. 221, 358 S.E.2d 782 (1987).

The respondent argues that *Edwards v. Arizona* test in this case shows that the petitioner was not under distress and therefore withdrew his request for counsel freely and voluntarily. But that is not what happened, and the petitioner actually only withdrew his request for counsel after being again questioned by the officers after a break in questioning after his request for counsel.

Disc 2 of 4 in the interview of Rose begins at 11:28 a.m. on the same date (Statement of Heath Rose Disc 2 of 4). The same two members of the Sheriff's department again began to interview the petitioner. The Sheriff says, "I could tell it was eating at you, so I asked you if you wanted to talk to us and at that point you indicated you wanted to talk to us without an attorney" (Id.). This is a clear violation of *Marcum* and *Crouch*.

Rose requested an attorney approximately seven times in the first interview (Statement of Heath Rose Disc 1 of 4). This conversation to reinstate the interview and the voluntary statement with police was NOT initiated by the petitioner as stated by the Sheriff (Statement of Heath Rose Disc 2 of 4). At this point, the Sheriff reads the petitioner his rights again (Statement of Heath Rose Disc 2 of 4). Because the first part of the test in *Crouch* has clearly not been met, the entire statement is NOT admissible and cannot be shown to the jury.

B. Witness Brittney Kennedy's testimony was affected by her intoxication making her an incompetent witness.

The respondent argues that a review of the records shows that Kennedy was not incompetent as a witness due to her intoxication of narcotics and marijuana. The respondent further argues that the trial court noted that after watching and listening to Kennedy, the court could not make a finding that she was impaired (HR_202). The respondent finally argues that this Court should respect the lower court's decision (Response at 17).

The evidence from the transcript shows the court was most definitely concerned, concerned enough to even drug test Kennedy. In fact, the Court stated:

The Court: You know, I've been wrong before, but I'm concerned about this witness. I think she behaved inappropriately. When she answered questions, her voice was slurred. She closed her eyes for long periods of time. Maybe she's under stress and it has that effect on her, but I don't know. I think she needs to be drug tested, and that way we'll know if she's okay. If it's okay, it's all good.

(HR_200-201.). In the present case, when evaluating the test in *Burgess*, first it is clear Kennedy was under the influence. The Court ordered the drug test because she was overly concerned with her behavior and testimony. Second, Kennedy failed for three different drugs being marijuana, narcotics and benzodiazepines (HR_084-085) This cocktail of drugs is sure to cause sleepiness, disorientation and confusion.

In the present case, one of two things must have happened after the results of the drug screen came back and the admissions to smoking marijuana of Kennedy. First the testimony should have been struck as unreliable due to the impairment of Kennedy. If the Court did not think this was necessary, then a limiting instruction should have been given to the jury regarding the testimony of Kennedy under the influence by her drug screen and self-admission. Neither happened. The Court should have either excluded the testimony, ordered a mistrial or instructed the Jury on the self-admission and findings of the drug test regarding Kennedy's testimony. None of this happened even though the Court and counsel were aware that Kennedy was "high" when she testified in Court, the jury was not.

Due to the actions of Kennedy, it is clear that she did not have the requisite knowledge, due to her intoxication, to clearly and truthfully testify or the ability to truthfully recall what happened.

C. The statement of Violet Telfer was testimonial and did violate the Confrontation Clause. Furthermore, this testimony was not harmless error.

The respondent argues that the record is clear that the State substantially attempted and diligently tried to secure Telfer for trial. This is just not true. All the state did was call her multiple times and travel to her listed address she gave the police on the date of the incident (HR_235, 267-268). The state had evidence that she had moved to Ohio but never followed up

with authorities in Ohio. In 2023, the state has the ability to find a person by multiple means and calling and going to an old address is clearly not sufficient. In fact, a personal investigator, using technological means, can usually find a person in just one day. Calling a phone number and going to one address is not sufficient to state the witness is unavailable with today's technology.

The statement was also clearly testimonial under *Bouie*. The prior recorded statement of Telfer should not have been presented to the jury and was clearly damning to the petitioner as she says she saw him standing over the body of the victim with a gun and making statements about the shooting (HR_268). For the respondent to say this is non-testimonial is laughable. To prove their case, the state must prove that the petitioner in fact shot the victim. The testimony of Telfer stating that the petitioner was standing over the victim, with a gun and making statements about shooting the victim is clearly testimonial. None of the exceptions are met under Rule 804(a) for the witness being declared unavailable and Simpkins had no ability to cross examine her which is a clear constitutional right of the petitioner.

D. There was clearly a conflict between the Petitioner and Assistant Prosecuting Attorney Josh Farrell.

The respondent argues that Farrell stated that there is nothing in the civil case that would have to do with guilt or innocence in a criminal trial and therefore, there is no conflict.

Rule 1.9(c)(1) and (2) of the W.Va. Rules of Professional Conduct state:

- A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.9 - Duties to Former Clients, W.Va. R. Prof. Cond. 1.9. Representing a client in a civil accident lawsuit would privy the attorney to a very thorough amount of information including medical records, psychological records and employment records. The attorney would learn about the personal life of the client and the day-to-day activities of the client. This information would clearly be used just a year later in the prosecution of a defendant by the same lawyer who would know the relationship between the defendant and Kennedy through his civil representation. The argument is clearly not baseless.

II. CONCLUSION

In conclusion, the Petitioner prays that this Court will reverse the underlying court's sentencing order and remand this matter back to the Circuit Court of Mingo County for a new trial.

HEATH ROSE
By Counsel

/s/ Joseph H. Spano, Jr.
Joseph H. Spano, Jr.
Pritt & Spano, PLLC
1204 Virginia St. E.
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No: 11373
jspano@yourwvlawfirm.com

SUPREME COURT OF APPEALS OF WEST VIRGINIA

**State of West Virginia,
Plaintiff Below, Respondent**

vs.

No. 23-272

**Heath Allen Rose,
Defendant Below, Petitioner**

**Appeal from the Order of the Circuit
Court of Mingo County
(Court Case No. 22-F-135)**

CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., counsel for Heath Rose, Petitioner, do hereby certify that service of the foregoing *Petitioner's Reply Brief* in the above styled case have been made upon the following:

Andrea Nease Proper, Esq.
Assistant Attorney General
Office of the WV Attorney General
Appellate Division
1900 Kanawha Blvd. E.
State Capitol Complex, Bldg. 6, Ste. 406
Charleston, WV 25305

this the 2nd day of November 2023, via United States mail, in a sealed envelope, postage prepaid.

/s/ Joseph H. Spano, Jr. _____
Joseph H. Spano, Jr.
Pritt & Spano, PLLC
714 ½ Lee Street, E., Suite 204
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No: 11373
jspano@yourwvlawfirm.com