

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,
Respondent

v.

Supreme Court No. 24-102
Underlying Case No. 22-F-45
Circuit Court of Marion County

JACQUAIN CRAWFORD,
Petitioner

PETITIONER'S BRIEF

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PROCEDURAL HISTORY

Petitioner Jacquain Crawford was indicted by the Marion County grand jury and charged with one count of Possession with the Intent to Deliver, Cocaine, Possession with the Intent to Deliver, Fentanyl, Use or Presentation of a Firearm During the Commission of a Felony, Possession of a Firearm by a Prohibited Person, Conspiracy to Commit a Felony, and Prohibited Person Carrying a Concealed Firearm.

After a jury trial, Mr. Crawford was found guilty on all counts with the exception of the Conspiracy charge, on which Mr. Crawford was found not guilty. The State subsequently filed a recidivist action wherein Mr. Crawford entered into a plea agreement with the State for an agreed disposition with the express provision that he retained his right to appeal his underlying convictions.

At trial, the State failed to offer competent evidence to sustain the convictions aforesaid, as evidenced by the testimony of the investigating officer. Further, the State, without advanced notice, substituted their own witness from the West Virginia State Crime Lab to testify as to the nature of the alleged controlled substances Mr. Crawford allegedly possessed. The State noted on its filed witness list that it would call the analyst who performed the analysis of the substances, but at trial, and over the objections of Mr. Crawford, called as a witness the analyst's supervisor to testify as to the analysis that was performed.

Both of these violations affected Mr. Crawford's right's under both West Virginia case law as well his constitutional rights to confront his accusers. These errors ultimately led to Mr. Crawford's convictions and are the basis for this appeal. Mr. Crawford appeals his convictions pursuant to Rule 5 of the West Virginia Rules of Appellate Procedure.

ASSIGNMENT OF ERRORS

- A. The evidence presented at trial was insufficient to sustain a conviction on several charges, not the least of which was the charge of Use or Presentation of a Firearm During the Commission of a Felony as well as both Possession with the Intent to Deliver a Controlled Substance charges

The evidence presented at trial was clearly insufficient to sustain a conviction for the charge in Count 3 of the indictment, Use or Presentation of a Firearm During the Commission of a Felony. Notwithstanding the fact that the State failed to offer competent evidence of the underlying predicate felony offense required to sustain a conviction for this charge (see subsection “B” below), the two critical elements of this charge is that Mr. Crawford is required to have either “used” or “presented” a firearm during the commission of said underlying felony.

The statute under which Mr. Crawford was charged is not ambiguous or otherwise in dispute. W.Va. Code 61-7-15a states, in relevant part, the following:

Any person who, while engaged in the commission of a felony, **uses** or **presents** a firearm shall be guilty of a felony (emphasis added)

The State has unilaterally and for its own benefit attempted to rewrite the statute under which Mr. Crawford was charged to include the element of “possession” of a firearm as well. “Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.” Syl. Pt. 2, Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970). “A statute is open to construction only where the language used requires interpretation because of ambiguity which renders is susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” Id. At 386. “Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to rules of interpretation.” Syl. Pt. 2, State ex rel. Underwood v. Silverstein, 278 S.E.2d 886 (1981), citing State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968). “It is presumed that each word in a statute has a definite meaning and purpose.” State ex rel. Johnson v. Robinson, 162 W.Va. 579, 251 S.e.2d 505 (1979).

“Courts should favor the plain and obvious meaning of a statute as opposed to a narrow or constrained construction.” Thompson v. Chesapeake & O. Ry. Co., 76 F.Supp 304.

The necessary elements of the particular crime with which Mr. Crawford is charged include the words “use” and “presents.” *Use* is defined by Merriam-Webster as “to put into action or service.” Likewise, *present* is defined as “to aim, point, or direct (something, such as a weapon) so as to face something or in a particular direction.” Clearly, nowhere to be found is the noun *possession* or any derivative thereof. If a word is not included in the statutory construction, then it cannot be unilaterally added by the State so as to fit its definition when, by all accounts, the actions of Mr. Crawford did not fall into the original elements of W.Va. §61-7-15a.

The West Virginia legislature, in enacting this statute, could have very easily included the term “possession” as a potential required element of the offense much the way it did with “use” and “present.” But, it did not include that language. Of course, the West Virginia state code is replete with the requirements of “possession” so presumably the legislature knows the plain difference between these requirements. For instance, the legislature has enacted several offenses which require actual “possession.” These offenses include, but are not necessarily limited to, the offenses of possession with the intent to deliver a controlled substance, possession of a firearm by a prohibited person, possession of a deadly weapon by a minor, possession of machine guns, possession of stolen property, and possession of materials depicting minors engaged in sexually explicit conditions. It is beyond clear that the legislature knows the meaning of the term “possession” and can and has included its requirement in various parts of the West Virginia Code. Failure to do so connotes an actual purpose and intent. For the crime alleged to have been committed by Mr. Crawford, the State must prove he either used or presented a firearm in the commission of a felony.

In support of its position, the State called Sgt. Charles Funk of the Whitehall Police Department to testify concerning the facts and circumstances of Mr. Crawford's arrest, detention, and subsequent search of the vehicle and his belongings. Sgt. Funk was, for all intents and purposes, the "lead investigative officer" in this case. On cross-examination, undersigned Counsel questioned Sgt. Funk concerning the results of his investigation relative to the charges alleged. When specifically asked whether Mr. Crawford used a firearm during the commission of a felony, Sgt. Funk testified, under oath, "he did not." When specifically asked whether Mr. Crawford presented a firearm during the commission of a felony, Sgt. Funk testified, under oath, "he did not."

The State, on redirect, attempted to show that Sgt. Funk didn't fully appreciate the nature of his own testimony. In fact, I believe the State felt that Sgt. Funk was confused, given that he had never testified in court previously. Of course, that begs the question, if Sgt. Funk's testimony relative to this charge was inaccurate or if he did not fully understand the charges against Mr. Crawford, then how accurate was any of his testimony?

What is not in dispute is 1) the elements of the statute required to have been proven to have been committed, and 2) Sgt. Funk testified that Mr. Crawford did not commit either of the elements. Clearly, by the State's own witness (and its only witness relative to the charges), the evidence was insufficient to support a conviction on this charge.

- B. The Defendant's 6th Amendment Constitutional Right was violated when the Court allowed the State to call as a witness an individual who was not identified on its proposed witness list and was not the analyst who performed the analysis upon which the State relied

The Court improperly allowed the State to call a significant trial witness that was not identified on the State's proposed witness list to the Defendant's prejudice. This "trial by ambush" was clearly detrimental to the Defendant's ability to properly and adequately prepare a defense.

On or about the 27th day of June, 2023, the State filed its proposed witness list. On this list of witnesses, the State identified Ms. Tiffany Neu of the West Virginia State Crime Lab. Ms. Neu was the analyst who performed the analysis on the alleged controlled substances that were the basis of at least four of the charges against the Defendant. After receiving the lab results from the State, undersigned Counsel prepared to question Ms. Neu about her findings. At trial, the State then called Mr. Blake Kinder, also of the West Virginia State Crime Lab, to testify, much to the surprise of undersigned Counsel. Over undersigned Counsel's objections, this Court did allow Mr. Kinder to testify as to the lab results. This, despite the fact that Mr. Kinder was not the analyst who performed the requisite analysis and had no first-hand knowledge of same.

The 6th Amendment to the United State's constitution makes it perfectly clear that a Defendant has an absolute right to know who his accusers are. "In all criminal prosecutions [the accused] has the right...to be confronted with the witnesses against him." Crawford v. Washington, 541 U.S. 36. This confrontation clause extends to laboratory analysts, whose findings are testimonial in nature. "An analyst's certification prepared in connection with a criminal investigation or prosecution ... is "testimonial," and therefore within the compass of the Confrontation Clause." Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

Undersigned Counsel was unable to cross-examine Ms. Neu concerning her findings relative to her testing of the alleged controlled substances. Nor was Ms. Neu's absence adequately addressed by the State. Mr. Kinder was improperly called as a

witness to delineate Ms. Neu's findings. The Supreme Court addressed this situation as well. In Davis v. Washington, 547 U.S. 813 (2006), the State attempted to call a police officer to "explain" the facts contained in another officer's report. Facts, as it turns out, that were testimonial and only in the purview of the officer who generated the report. The Court held that, "[The] Confrontation Clause may not be 'evaded by having a note-taking [officer] recite the ... testimony of the declarant.'" *Id.* The Court further intimated that it will not allow the testimonial statement of one witness to be substituted into evidence through the in-court testimony of another witness. "[T]he analyst who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" Melendez-Diaz.

The Supreme Court put a bow on this line of cases when the State attempted to call as a witness an analyst who did not perform the necessary analysis relied upon by the State in its prosecution. In Bullcoming v. New Mexico, 564 U.S. 647 (2011), the State called as a witness an analyst who did not perform any analysis of the Defendant's blood draw in a DUI case. In overruling Bullcoming's conviction, the Court ruled that, when the State elected to introduce the analyst's work, he became a witness that the Defendant had the right to confront as set forth in the Confrontation Clause. *Id.*

The State did not allege that Mr. Kinder had any independent opinion absent Ms. Neu's findings. Mr. Kinder, not having performed the analysis himself or personally observing Ms. Neu's work, could not opine on what Ms. Neu knew or observed about the work performed, nor did he have any specific knowledge as to why Ms. Neu was unavailable to testify. There were a litany of questions that could have, and should have, been directed at Ms. Neu. These same questions could not have been answered by Mr. Kinder. Accordingly, Ms. Crawford was prejudiced by the Court's willingness to allow a

State witness who was not identified, who did not perform any of the analysis, and who could not opine on the veracity of same.

CONCLUSION

The evidence presented at trial on which a conviction was obtained was clearly insufficient to obtain such a conviction. The investigating officer testified as much when, specifically asked whether Mr. Crawford committed the elements of the offense of Use of Presentation of a Firearm During the Commission of a Felony he answered in the negative. There is no spin here, these were the actual words of law enforcement who investigated the offense.

In addition, the Court impermissibly permitted a witness for the State, who was not previously identified as such, to testify on behalf of the State relevant to an essential element to at least four (4) of the charges. This clearly violated Mr. Crawford's right to confront his accuser and, quite frankly, came as a complete surprise to Mr. Crawford's preparation of his defense.

For the forgoing reasons, the Petitioner moves this Court to reverse the Petitioner's conviction and to remand this matter to the circuit court for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Lance E. Rollo, hereby certify that on the 17th day of July, 2024, I served the foregoing, Petition for Appeal, upon the State of West Virginia, by electronically filing a true copy of same as follows:

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