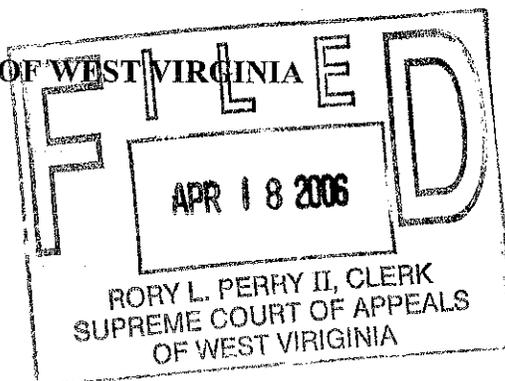

NO. 32961

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

JEFFREY LEE FINLEY,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

This is an appeal by Jeffrey Lee Finley (“Appellant”) from his jury conviction of life without mercy during the penalty phase of his bifurcated trial in the Circuit Court of Cabell County, the Honorable Dan O’Hanlon presiding.

II.

STATEMENT OF FACTS

A. FACTUAL HISTORY.

Mabel Hetzer lived in the same little house in West Huntington for all of her life. It is safe to say that the last minutes of that life were spent in sheer terror. On March 22, 1999, Mabel Hetzer was found dead by two friends—from her church—who became concerned when they could not reach her by telephone.¹ What they found confirmed their fears.²

¹Trial Tr. 138.

²Trial Tr. 139.

Mabel Hetzer, at the age of 92,³ had been beaten, raped—both anally and vaginally—forced to drink a caustic liquid, had her back broken, and was manually strangled.⁴ In addition to this vicious assault, Mabel Hetzer's assailant left a bite mark on her right buttock.⁵ This was how she died.

Mabel Hetzer had insisted upon living alone, and had told her aunt, Effie McHaffie, that she was born in that house and would stay there until she died.⁶

Mabel Hetzer had a neighbor, Jeffrey Finley (Appellant), who lived in the house next door, with his wife, Libby Finley. Also residing in the Finley house was a mixed breed Rottweiler dog, named Heidi. Heidi roamed an enclosed area that connected the Finley residence and the Hetzer residence, and Heidi would not allow strangers into this area.⁷

Michael Coffey, one of the investigating officers, described an incident with Heidi that occurred on March 25, 1999, when he was surveying the alleyway behind Mabel Hetzer's house. Coffey testified that he was unable to enter the fenced-in yard of the Hetzer residence because of Heidi's behavior and demeanor.⁸

As noted above, the assailant left a bite mark on the victim, and from this mark a swab was collected for DNA testing and analysis. The results of the DNA testing determined that 99.999%

³Trial Tr. 410.

⁴Trial Tr. 411-13.

⁵Trial Tr. 411.

⁶Trial Tr. 134.

⁷Trial Tr. 147-48.

⁸Trial Tr. 457-58.

of the population was excluded as a donor of the DNA material, but that Appellant was not excluded.⁹

During the trial, Appellant devoted much time detailing the numerous random acts of kindness he performed for his neighbor, whom he described as “Miss Mabel.”¹⁰ Appellant’s wife testified in a similar manner, although seemed surprised when confronted in cross-examination with a Huntington Police Department incident report where “Miss Mabel” had called the police to report a missing ring, and had named Libby Finley as the suspect.¹¹

Oddly enough, this good neighbor exhibited no interest in “Miss Mabel” on the day her body was discovered. As described by Corporal John Franklin of the Huntington Police Department, after the discovery of her body, a number of law enforcement officers and vehicles were at the victim’s residence, even to the point of blocking the road. Given all of this, Corporal Franklin observed Appellant walking past the victim’s home and described him as follows: “He had his head down. He never looked up.”¹² Corporal Franklin testified that he found this behavior “very strange,” since neighbors invariably make inquiries of law enforcement personnel under such circumstances.¹³ Corporal Franklin also noticed Appellant’s dog, Heidi, and testified that the dog “was not going to

⁹Trial Tr. 502.

¹⁰Trial Tr. 619-22.

¹¹Trial Tr. 606-07.

¹²Trial Tr. 146.

¹³Trial Tr. 147.

let [them] back in there,”¹⁴ referring to the common area between the Hetzer home and Appellant’s residence.

Trial testimony indicated the assailant had entered through a broken window on the side of the victim’s house,¹⁵ the window of which is located on the side of the house “guarded” by the Finley’s dog Heidi.

Sergeant David Castle of the Huntington Police Department was among the first officers on the scene, and he observed a purse in what he described as “out of place,” on top of a lighted gas heater.¹⁶ Sergeant Castle then opined that it may have been placed there “for someone to have easier access to look through it.”¹⁷

The trial testimony described above established that entry to the victim’s house was likely made through the broken window, located on the side of the victim’s house that abutted Appellant’s property. As noted above, that side of the house was “guarded” by Heidi, who would allow no stranger to enter the area. The assailant brutally beat, tortured, raped, and strangled a 92 year-old woman, and then apparently rifled through her purse.

Appellant, who told the jury of his numerous good deeds for, and interest in, “Miss Mabel,” walked past his neighbor and friend’s house carrying recently purchased beer, while the house was surrounded by emergency vehicles and personnel, without so much as a glance or any expression of

¹⁴Trial Tr. 148.

¹⁵Trial Tr. 145-46.

¹⁶Trial Tr. 210.

¹⁷*Id.*

concern or any interest about his elderly friend and neighbor. One can only speculate about his lack of interest and about the source of the funds for the beer.

At the conclusion of the trial, the jury found Appellant guilty of all counts of the indictment: two counts of sexual assault in the second degree and murder in the first degree. At the conclusion of the bifurcated penalty phase of the trial the jury deliberated some 25 minutes before refusing to grant mercy to Appellant.

During this penalty phase of the trial, Appellant was clothed in jail attire. He was not shackled. It is the policy of the Cabell County Sheriff's Department that prisoners are not shackled during matters involving juries.

At sentencing, the circuit court observed that the crime "is, in my 25 years as a judge, the most horrible single crime I've ever presided over."¹⁸

It is also important to make clear at this time: The DNA evidence eliminated some 99.999% of the population. Heidi eliminated the rest, save one—Jeffrey Lee Finley.

B. PROCEDURAL HISTORY.

In May 2003, the Grand Jury for Cabell County, West Virginia, returned an indictment charging Appellant with "MURDER" (Count I), and two counts "2ND DEGREE SEXUAL ASSAULT" (Counts II and III).¹⁹ At the conclusion of the guilt phase of his bifurcated jury trial on September 29, 2004, the jury found Appellant guilty of all three counts as charged in the Indictment.²⁰

¹⁸Sentencing Hearing, p. 38.

¹⁹Record ("R.") 1-2.

²⁰See R. C291-92.

At Appellant's *LaRock*²¹ hearing, held on October 12, 2004,²² Appellant was clad in jail attire. He was not shackled—either in handcuffs or in leg restraints—before the jury. It is standard procedure for the Cabell County circuit courts to have any shackling removed *prior* to *any* jury entering *any* courtroom.

At the conclusion of the penalty phase of his bifurcated trial, the jury deliberated approximately 25 minutes before refusing to grant mercy on Appellant's life sentence.²³

Appellant proceeded to waive his right to a pre-sentence investigation, and therefore the circuit court immediately sentenced Appellant to “Life with No Recommendation of Mercy” as to Count I; 10 to 25 years as to Count II; and 10 to 25 years as to Count III; with all sentences to run consecutively to each other.²⁴

It is from his jury conviction and sentence of life without mercy that Appellant brings his appeal.

III.

ASSIGNMENT OF ERROR

This Court granted Appellant's petition for appeal as to one Assignment of Error only:

[W]hether [Appellant] was improperly required to wear a jail uniform during the penalty phase of his trial.²⁵

²¹*State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

²²*See* R. C293-94.

²³*Id.*

²⁴*Id.*

²⁵Order granting Appellant's petition for appeal.

IV.

“No prejudice can result from seeing that which is already known.”²⁶

ARGUMENT

BECAUSE THE PRESUMPTION OF INNOCENCE ALREADY HAD BEEN REBUTTED AND [APPELLANT] HAD BEEN FOUND GUILTY BEYOND A REASONABLE DOUBT, THERE WAS NO REASONABLE POSSIBILITY THAT THE JURY WOULD BASE ITS PENALTY DECISION ON THE FACTOR OF [APPELLANT’S] ATTIRE.²⁷ THUS, APPELLANT WAS NOT IMPROPERLY REQUIRED TO WEAR A JAIL UNIFORM DURING THE PENALTY PHASE OF HIS TRIAL, AND THE CIRCUIT COURT DID NOT COMMIT REVERSIBLE ERROR.

1. The Standard of Review.

“Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.”²⁸

2. Discussion.

This Court granted Appellant’s petition for appeal as to one Assignment of Error only. “[W]hether [Appellant] was improperly required to wear a jail uniform during the penalty phase of his trial.”²⁹ Appellant, however, attempts to muddle the issue with irrelevant misinformation by insinuating that during the penalty phase of his bifurcated trial, Appellant was also wearing leg restraints.³⁰ But upon closer inspection, even Appellant acknowledges, *somewhat*, this statement is

²⁶*Estelle v. Williams*, 425 U.S. 501, 507 (1976) (quoting *United States ex rel. Stahl v. Henderson*, 472 F.2d 556 (1973)).

²⁷*People v. Bradford*, 939 P.2d 259, 338 (Cal. 1997).

²⁸*State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975).

²⁹Order granting Appellant’s petition for appeal.

³⁰*See* Brief, p. 5.

not true.³¹ In fact, according to the Cabell County prosecutor and the bailiff attendant at Appellant's penalty-phase trial, it is standard procedure for the Cabell County circuit courts to remove any shackling (both leg restraints and handcuffs) *prior* to any jury entering any courtroom. Thus, the jury in the instance case did not witness Appellant in "shackles" during his penalty-phase trial, and any argument by Appellant is irrelevant.

The issue of whether Appellant was improperly required to wear a jail uniform during the penalty phase of his trial is one of first impression in this state. And little case law has been found directly on point. But what law has been found is directly in accord with the premise upon which *Estelle v. Williams* was found. That premise—that *fundamental*—being: the presumption of innocence.

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The *presumption of innocence*, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:

"The principle that there is a *presumption of innocence* in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."

.....

The potential effects of presenting an accused before the jury in prison attire need not, however, be measured in the abstract. Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system.³²

Williams held, in essence, that the state cannot compel an accused to stand trial before a jury while wearing identifiable prison attire. But the trial and jury *Williams* speaks of is the one prior to

³¹See Brief, p. 5 n.2.

³²*Williams* at 503-04 (emphasis added) (citations omitted).

conviction; that is, while an accused stands innocent before his peers. In fact, *Williams* discusses the Fifth Circuit (the circuit from where the case originated) and its refusal to adopt a *per se* rule invalidating all convictions where an appellant had appeared wearing such attire. The *Williams* court discussed the harmless-error doctrine, situations where an appellant had been tried for an offense committed while in confinement, during an attempted escape, and also where the defense used it as trial strategy in hopes of eliciting sympathy from the jury.³³

Against the basic reasoning and holding of *Williams*, in 1995, the Ninth Circuit held in *Duckett v. Godinez*³⁴ that “requiring a defendant to wear prison clothes during sentencing is not prejudicial and does not violate due process.”³⁵ The court’s reasoning flowed naturally from an accused’s fundamental right to a fair hearing and the presumption of innocence he inherently possesses before being found guilty or not.

*The presumption of innocence, however, no longer applies in the penalty phase of a bifurcated trial. At the penalty phase, the defendant stands convicted. His condition as a prisoner is no surprise to the jury, which just found him guilty. Prison clothing cannot be considered inherently prejudicial when the jury already knows, based upon other facts, that the defendant has been deprived of his liberty. See Estelle v. Williams, 425 U.S. at 507, 96 S. Ct. at 1694 (recognizing that “[n]o prejudice can result from seeing that which is already known”) (quotations and citations omitted)[.]*³⁶

³³See *Williams* at 506-08.

³⁴67 F.3d 734 (9th Cir.1995).

³⁵*Id.* at 746.

³⁶*Id.* at 747 (emphasis added).

Then in 1997, the Supreme Court of California announced the following holding in *People v. Bradford*.³⁷

Because the presumption of innocence already had been rebutted and defendant had been found guilty beyond a reasonable doubt, there was no reasonable possibility that the jury would base its penalty decision on the factor of defendant's attire.³⁸

The facts of *Bradford* (and for that matter, *Duckett*) are directly on point with the facts of the case at bar, save one exception: in *Bradford*, the defendant was offered initially to wear his civilian clothing but refused. That one bit of difference is of no matter here, however, because the *Bradford* court discussed the case even *assuming* error had occurred, and it is there where the law is relevant to the present case.

First and foremost, the *Bradford* court made clear that "the rule that a defendant may not be compelled to attend trial in jail or prison garb is premised upon the notion that doing so might subvert the *presumption that an accused is innocent until proved guilty*."³⁹

The *Bradford* court had explained its reasoning for this simple truth only paragraphs before.

The wearing of jail clothing, serving constantly to remind the jury that the defendant is in custody, tends to undermine the *presumption of innocence* by creating an unacceptable risk that the jury impermissibly will consider that circumstance in rendering its verdict.⁴⁰

³⁷939 P.2d 259 (Cal. 1997).

³⁸*Id.* at 338.

³⁹*Id.* (emphasis added).

⁴⁰*Id.* (emphasis added).

The issue in the *Bradford* case is directly on point with the case at bar, and surrounded the penalty phase of the trial. After holding the “defendant had not demonstrated any possibility of prejudice[,]”⁴¹ the *Bradford* court further held the following.

*In the present case, defendant’s guilt of both murders already had been determined at the guilt phase of the trial, and at the time defendant appeared in county jail clothing, the jury was confronted with the remaining issue of the appropriate penalty. Because the presumption of innocence already had been rebutted and defendant had been found guilty beyond a reasonable doubt, there was no reasonable possibility that the jury would base its penalty decision on the factor of defendant’s attire.*⁴²

In the present case, Appellant wore jail attire and appeared before the jury during the penalty phase of the trial *only*. It was the *same* jury which had previously convicted him of the brutal double rape and strangulation murder of a 92-year-old woman. Thus, in the penalty phase of Appellant’s trial, “[b]ecause the presumption of innocence already had been rebutted and [Appellant] had been found guilty beyond a reasonable doubt, there was no reasonable possibility that the jury would base its penalty decision on the factor of [Appellant’s] attire.”⁴³

Thus, because there was no reasonable possibility that the jury would base its penalty decision on the factor of Appellant’s attire, this Court should find that the circuit court did not commit reversible error, because Appellant was not improperly required to wear his jail uniform during the penalty phase of his trial.

⁴¹*Bradford* at 338.

⁴²*Id.* (emphasis added) (citations omitted).

⁴³*Id.* (citations omitted).

V.

CONCLUSION

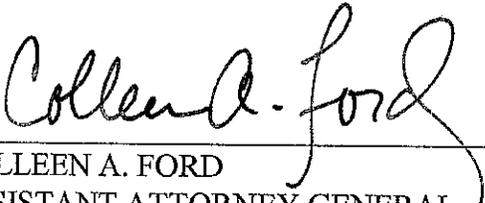
For all of the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Cabell County.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

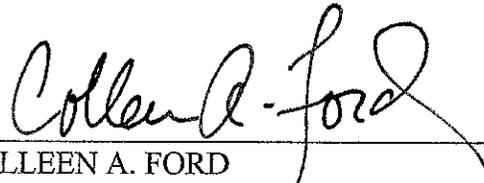
A handwritten signature in cursive script that reads "Colleen A. Ford". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 18 day of April, 2006, addressed as follows:

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