

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
JOHN MCLAURIN,

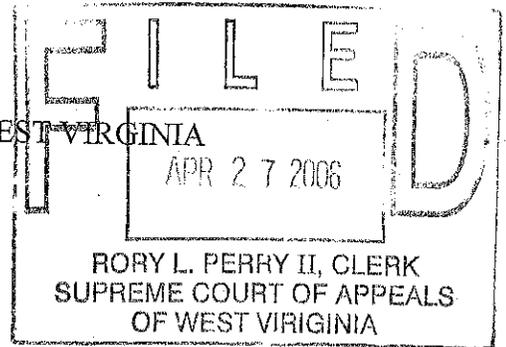
Appellant,

v.

THOMAS MCBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
Appellee.

Supreme Court No. 32983

Circuit Court No. 00-MISC-16
(Kanawha)



APPELLANT'S REPLY BRIEF

Gregory L. Ayers
Deputy Public Defender
W.Va. Bar No. 7824
Office of the Public Defender
Kanawha County
Charleston, WV 25330
(304) 558-2323

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY ARGUMENT	1
I. THE TRIAL COURT'S REFUSAL TO GRANT A COMPETENCY EVALUATION, WHEN TRIAL COUNSEL BELIEVED MCLAURIN WAS NOT COMPETENT TO STAND TRIAL AND PRESENTED EVIDENCE OF A POSSIBLE PROBLEM WITH HIS COMPETENCY, DENIED MCLAURIN DUE PROCESS OF LAW. THIS ERROR CANNOT BE CONSIDERED HARMLESS AS THE STATE SUGGESTS.....	1
II. THE STATE FAILED TO SHOW A COMMON SCHEME OR PLAN TO THE THREE UNRELATED SEXUAL ASSAULTS, I.E., FACTS SO UNUSUAL OR DISTINCTIVE TO CONSTITUTE A "SIGNATURE" IDENTIFYING MCLAURIN AS THE ASSAILANT, TO JUSTIFY THEIR TRIAL TOGETHER. THE OVERWHELMING PREJUDICE RESULTING FROM THE IMPROPER JOINT TRIAL OF MULTIPLE SEXUAL ASSAULT ALLEGATIONS CANNOT BE HARMLESS ERROR AS THE STATE ARGUES.....	4
III. THE TRIAL COURT'S REFUSAL TO GIVE A LIMITING INSTRUCTION REGARDING HOW THE JURY COULD USE THE COLLATERAL CRIMES EVIDENCE WAS NOT HARMLESS ERROR AS THE STATE CONTENDS.....	6
IV. STATE V. WOODALL'S REQUIREMENT THAT THERE BE "ELAPSED TIME BETWEEN SEPARATE VIOLATIONS" MEANS MORE THAN A FEW SECONDS.....	8
V. TRIAL COUNSEL'S FAILURE TO SAY ANYTHING OR PRESENT ANYTHING ON MCLAURIN'S BEHALF AT SENTENCING WAS A DENIAL OF COUNSEL AND PREJUDICE IS PRESUMED. THIS DENIAL OF COUNSEL CANNOT BE EXCUSED BY THE DIFFICULTY OF THE CASE OR MCLAURIN'S PRIOR RECORD.....	9
RELIEF REQUESTED.....	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Pate v. Robinson</u> , 383 U.S. 375, 385, 86 S.Ct. 836, 842 (1966)	3
<u>State ex rel. Caton v. Sanders</u> , 215 W.Va. 755, 762, 762 n.7, 601 S.E.2d 75, 82, 82 n.7 (2004).....	7
<u>State ex rel. Daniel v. Legursky</u> , 195 W.Va. 314, 325, 465 S.E.2d 416, 427 (1995).....	9
<u>State ex rel. Webb v. McCarty</u> , 208 W.Va. 549, 542 S.E.2d 63 (2000).....	3
<u>State v. Chapman</u> , 210 W.Va. 292, 301, 557 S.E.2d 346, 355 (2001)	2
<u>State v. Cheshire</u> , 170 W.Va. 217, 220-21, 292 S.E.2d 628, 631-32 (1982).....	4
<u>State v. Graham</u> , 208 W.Va. 463, 471-72, 541 S.E.2d 341, 349-50 (2000)	7
<u>State v. McDaniel</u> , 211 W.Va. 9, 13, 560 S.E.2d 484, 488 (2001).....	5
<u>State v. Paynter</u> , 206 W.Va. 521, 526 S.E.2d 43 (1999).....	1,2,3,4
<u>State v. Scott</u> , 206 W.Va. 158, 168, 522 S.E.2d 626, 636 (1999)	8
<u>State v. Woodall</u> , 182 W.Va. 15, 385 S.E.2d 253 (1989).....	8
 <u>STATUTE</u>	
W.Va. Code § 27-6A-1(a) (1983).....	3

REPLY ARGUMENT

I. The Trial Court's Refusal To Grant A Competency Evaluation, When Trial Counsel Believed McLaurin Was Not Competent To Stand Trial And Presented Evidence Of A Possible Problem With His Competency, Denied McLaurin Due Process Of Law. This Error Cannot Be Considered Harmless As The State Suggests.

Appellee (hereafter the State) agrees that the habeas court failed to make the required findings of fact and conclusions of law with respect to this claim. State's Brief 7. However, the State argues that a remand would be a futile act as "there is no possibility a fact-finder could conclude that the Appellant was incompetent at the time of his trial." *Id.* The State has misstated the issue before the habeas court. Only a psychiatric evaluation at the time of trial, and not a fact-finder eighteen years later, could determine whether McLaurin was incompetent at the time of his trial. That, of course, is not the findings and conclusions the habeas court would be required to make in this case. The findings of fact and conclusions of law the habeas court failed to make in this case would relate to whether there was sufficient evidence presented to the trial court to make the "trial judge . . . aware of a possible problem with [McLaurin's] competency," Syl. Pt. 6, in part, State v. Paynter, 206 W.Va. 521, 526 S.E.2d 43 (1999), as in that circumstance "it is an abuse of discretion to deny a motion for psychiatric evaluation." *Id.* The State does not refer to this standard in its brief, probably because the evidence in this case clearly satisfies it.

When the State does address the evidence before the motions judge and argues the judge did not abuse his discretion in denying defense counsel's renewed motion for a psychiatric evaluation, the State completely omits any reference to trial counsel's representations that demonstrated there was a possible problem with McLaurin's competency to stand trial. State's Brief 9. The State does not acknowledge that trial counsel advised the court that he believed

McLaurin was "psychiatrically impaired," that McLaurin had not cooperated with counsel, that "it has been apparent to me for some time that there are major issues of psychiatric capacity[]" and McLaurin's ability to understand the consequences of his actions, the nature of the proceedings against him, and to cooperate in his defense. (11/7/89 Tr. 2, 3, 4, 12). Counsel further advised the court he believed an appropriate expert would conclude after examining McLaurin and his prison records that McLaurin is "psychiatrically impaired" and may not be competent to stand trial. (11/7/89 Tr. 8). Trial counsel further testified at the habeas evidentiary hearing that he was representing to the court that McLaurin was not competent to stand trial. (4/25/03 Tr. 133-34). As this Court noted in Paynter, 206 W.Va. at 528, 526 S.E.2d at 50, "[a] judge may be made aware of a possible problem with defendant's competency by . . . a lawyer's representation concerning the competency of his client[.]" See State v. Chapman, 210 W.Va. 292, 301, 557 S.E.2d 346, 355 (2001) (defense counsel's opinion regarding competency is "significant").

Thus, trial counsel's representations to the court, coupled with McLaurin's prison mental health records indicating that testing revealed perceptual difficulties often associated with organic brain damage (11/7/89 Tr. 8) (4/25/03 Tr. 51), made the trial court aware there was a possible problem with McLaurin's competency to stand trial. It is simply inaccurate to contend, as the State does, that trial counsel's comments at trial and at the habeas hearing below regarding McLaurin's incompetence boiled down to McLaurin's lack of cooperation and wanting to run the show. State's Brief 8.

The State makes much of the fact habeas counsel did not believe McLaurin was incompetent during the habeas proceedings which occurred approximately fourteen years after the trial. State's Brief 8, 10. This, of course, is a clever way for the State (1) to divert attention

from the real issue here -- whether the trial court was made aware of a possible problem with McLaurin's competency; and (2) to urge the Court to make the same quantum leap that the motions court did at the time of trial that "based on a layman's observation," it found nothing wrong with McLaurin. (11/7/89 Tr. 19). If a defendant's competency to stand trial could be definitively and reliably determined by the court or counsel there would be no need for the required psychiatric evaluation provided for in W.Va. Code § 27-6A-1(a) (1983). However, it cannot. The United States Supreme Court tacitly recognized this in Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 842 (1966) ("While [the defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."). This Court noted in Paynter, 206 W.Va. at 527, 526 S.E.2d at 49, "adequate state procedures must exist to make certain that a legally incompetent accused is not convicted." (citation omitted). As shown above, the trial court did not follow those procedures when it was made aware of a possible problem with McLaurin's competency. Contrary to the State's suggestions, that is the rule of law to be applied in this case.

The State further tries to distinguish State ex rel. Webb v. McCarty, 208 W.Va. 549, 542 S.E.2d 63 (2000), where the Court found the defendant was entitled to a psychiatric evaluation to determine competency even though it had not been completed a full year after it was ordered due to the defendant's lack of cooperation. Id. at 551 n.2, 554, 542 S.E.2d at 65 n.2, 68. The State asserts that State ex rel. Webb was decided a decade after McLaurin's trial and the Court did not indicate the decision is retroactive. This argument is misplaced as a retroactivity issue is involved only if there is a new interpretation of the statute or rule of law. There is nothing new about State ex rel. Webb as it is consistent with prior decisions that require a competency evaluation before trial where evidence indicating a possible problem with a defendant's

competency is brought to the trial court's attention. See, e.g., State v. Cheshire, 170 W.Va. 217, 220-21, 292 S.E.2d 628, 631-32 (1982).

Finally, the State argues that even if the motions judge abused his discretion in denying defense counsel's renewed motion for a psychiatric examination to determine competency, McLaurin was not denied due process of law. State's Brief 10. That is a novel proposition -- which is not the law. As this Court noted in Paynter, 206 W.Va. at 527, 526 S.E.2d at 49, "[a] circuit court's failure to follow the proper statutory procedures to preserve this fundamental due process guarantee [against being tried and convicted while incompetent] affects a defendant's substantial rights." That is a fundamental due process violation. To further suggest, as the State does, that it can be harmless error misses the mark, widely. State's Brief 7.

II. The State Failed To Show A Common Scheme Or Plan To The Three Unrelated Sexual Assaults, i.e., Facts So Unusual Or Distinctive To Constitute A "Signature" Identifying McLaurin As The Assailant, To Justify Their Trial Together. The Overwhelming Prejudice Resulting From The Improper Joint Trial Of Multiple Sexual Assault Allegations Cannot Be Harmless Error As The State Argues.

The State initially asserts that the habeas court's findings of fact, in support of its conclusion there was a common plan, scheme, or design to the three unrelated sexual assaults, are not clearly erroneous. State's Brief 11. The State does so, however, in conclusory fashion without addressing any of the court's factual findings or how they show a common scheme or plan. The State further does not refute or rebut McLaurin's argument in his initial brief, at pages 26-28, that the relevant facts in the court's findings do not meet the definition of a common scheme or plan.

The State does acknowledge that for there to be evidence of a common scheme or plan or "modus operandi," the facts of the individual crimes must be "so distinctive that it can be seen

as a "signature" identifying a unique defendant." State v. McDaniel, 211 W.Va. 9, 13, 560 S.E.2d 484, 488 (2001) (citation omitted). However, the State does not point out these unique facts alleged to be common to the three incidents that are so distinctive to constitute a signature. Instead, the State, again in conclusory fashion, states that every fact-finder who has looked at this case has concluded there was "indeed a recognizable *m.o.* in the [J.T., B.S.] and [C.C] cases." State's Brief 12. The State never does say what the "recognizable *m.o.*" is.

The State further concedes that severance of the separate incidents for trial "may have been a safer course of action[.]" State's Brief 12. The State nonetheless contends that the only possible prejudice to McLaurin from an error in the trial court's ruling was in the C.C. case where the evidence was significantly weaker than in the J.T. and B.S. cases; and since the C.C. conviction was vacated, any error is harmless. State's Brief 12-13. The State's argument blindly overlooks the fact that where, as here, multiple sexual assault charges are improperly tried together that "the potential for unfair prejudice, by permitting evidence to come before the jury alleging that the defendant had previously raped a woman, was enormous." McDaniel, 211 W.Va. at 15, 560 S.E.2d at 490. As the McDaniel Court recognized:

Any jury, no matter how well instructed, would be sorely tempted to convict a defendant simply because of such a prior act, regardless of the quantum of proof of the offense for which the defendant was actually charged.

Id. Thus, when multiple sexual assault charges are improperly tried together, it is not so much the quantum of proof that convicts a defendant as the multiple allegations. McLaurin's convictions in the C.C. case on insufficient evidence and in the J.T. case on weak eyewitness testimony are classic examples of this.

The State is incorrect that the eyewitness identifications in the J.T. case were strong. On the contrary, the two identifications were very questionable. At the pretrial hearing on the

motion to suppress the identifications, when the trial court asked Carmen Hairston, one of the hotel maids, about her identification of McLaurin, "But you are not really sure, are you?," Hairston shook her head. (Tr. Vol. I 86-87). Susan Toney, the other hotel maid, described the man she saw as "not real big," weighing about 140 pounds. (Tr. Vol. I 346). McLaurin's arrest ticket (in the circuit clerk's file) on September 8, 1988, indicates he weighed 190 pounds. Toney also did not know if the man she identified was wearing glasses or had a beard. (Tr. Vol. I 67).

Moreover, the jury had questions about Toney's identification. During its deliberations, the jury sent the following note to the trial court: "We need Susan Toney's statement." (Tr. Vol. III 890). The trial court refused the jury's request. *Id.*

In addition, the State incorrectly argues that the pill bottle was found at the scene in the J.T. case. State's Brief 13. This evidence was found at the scene in the B.S. case. The only thing linking McLaurin to the J.T. assault at trial was the questionable eyewitness evidence. Again, McLaurin was likely convicted in the J.T. case for the same reason he was convicted in the C.C. case -- because of the multiple allegations.

III. The Trial Court's Refusal To Give A Limiting Instruction Regarding How The Jury Could Use The Collateral Crimes Evidence Was Not Harmless Error As The State Contends.

The State apparently concedes that it was error for the trial court to refuse to give a limiting instruction regarding how the jury could use evidence of the other alleged sexual assault incidents, i.e., collateral crimes, in deciding McLaurin's guilt or innocence of each alleged sexual assault. The State rather argues this error was harmless due to the strength of the evidence in the J.T. case (which McLaurin disputes above), and because the C.C. conviction was eventually vacated. State's Brief 13-14. The State's argument once again fails to acknowledge the inherent unfair prejudice from the joint trial of multiple sexual assault allegations; and particularly where,

as here, the jury is never given the required limiting instruction that in deciding the guilt or innocence of each offense they can not consider the evidence of the other alleged sexual assaults as evidence of guilt, but only for the purpose of determining whether there was a common plan or scheme involved. Thus, there was nothing to prevent the jury in this case from misusing the collateral crimes evidence in this case and considering it as evidence of McLaurin's guilt of each offense charged.

To protect the defendant's right to a fair trial and "to ensure that the jury does not use the evidence for an improper purpose," this Court has made such an instruction to the jury mandatory. State ex rel. Caton v. Sanders, 215 W.Va. 755, 762, 762 n.7, 601 S.E.2d 75, 82, 82 n.7 (2004). The failure to give this instruction can hardly be considered harmless error, particularly under the circumstances of this case involving multiple sexual assault allegations and the strong likelihood the jury would misuse the evidence for an improper purpose.

In this case, the prosecutor objected to the giving of the limiting instruction requested by defense counsel and the trial court agreed, stating "that it would prohibit the State arguing system, motive, and intent." (Tr. Vol. III 791). This case is yet another example of how the State's improper use of collateral crimes evidence became a "runaway train" sanctioned by the trial court.

One could write a dissertation on how Rule 404(b), *McGinnis*, [193 W.Va. 147, 455 S.E.2d 516 (1994)], and now *Edward Charles L.* [183 W.Va. 641, 398 S.E.2d 123 (1990)] have become a "runaway train" in some of our courts, when judges are tempted to abandon their proper gatekeeper role by over-zealous prosecutors. We have moved far away from the original purpose for permitting such evidence. The standard now seems to be: Will it help the prosecutor?

State v. Graham, 208 W.Va. 463, 471-72, 541 S.E.2d 341, 349-50 (2000) (Starcher, J., concurring).

McLaurin's constitutional right to a fair trial was crushed by this "runaway train" that not even the trial court was willing to slow down. "Tossing aside the safeguards of our Constitution to promote and insure convictions is a much greater threat to democracy than risking an occasional offender not being convicted." State v. Scott, 206 W.Va. 158, 168, 522 S.E.2d 626, 636 (1999) (Starcher, C.J., dissenting).

IV. State v. Woodall's Requirement That There Be "Elapsed Time Between Separate Violations" Means More Than A Few Seconds.

The State agrees that State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989), requires that there must be "conclusive evidence of elapsed time between separate violations []" before a defendant may be convicted of separate counts of sexual assault. Id. at Syl. Pt. 7, in part. The State, however, argues that McLaurin's two alleged acts of vaginal sexual intercourse with J.T. which immediately followed one another, separated by at most a few seconds, satisfies Woodall's requirement of conclusive evidence of elapsed time between separate violations. State's Brief 14. The State is incorrect as these facts simply do not fit the Woodall definition of "elapsed time."

Elapsed time between separate violations has to mean more than a few seconds. Otherwise, it is a contradiction in terms, akin to arguing in a homicide case the defendant acted with instantaneous premeditation.

The State's emotional appeal that, for the victim, the time it takes to change positions is surely "elapsed time" must be rejected. State's Brief 14. Woodall's requirement of elapsed time must be objectively applied if its rule of law is to prevail. While it is uncertain how much time must pass or elapse between separate violations, surely a few seconds does not qualify.

V. Trial Counsel's Failure To Say Anything Or Present Anything On McLaurin's Behalf At Sentencing Was A Denial Of Counsel And Prejudice Is Presumed. This Denial Of Counsel Cannot Be Excused By The Difficulty Of The Case Or McLaurin's Prior Record.

The State apparently concedes that McLaurin had a constitutional right to counsel at sentencing. The State further agrees that defense counsel did not make any argument or present anything on McLaurin's behalf at sentencing. State's Brief 16. The State nonetheless argues that counsel's effective absence at sentencing can be excused because McLaurin supposedly did not want his prison psychological records discussed at sentencing and nothing counsel could have said would have made any difference given McLaurin's prior record. State's Brief 17. The State's contention is a novel proposition which cannot be the law.

Because sentencing is a critical stage of a criminal trial, every defendant, even difficult ones with difficult cases, are constitutionally entitled to an advocate at sentencing. See Appellant's Brief 38. It can be argued that a defendant with a difficult case is even more in need of an effective advocate at sentencing than one whose case is not. In any event, McLaurin was denied an advocate at sentencing to which he was constitutionally entitled.

The State's proposed rule of law would allow this Court to find the absence of counsel at any critical stage of a criminal case to be harmless error if the defendant was obviously guilty and counsel's advocacy arguably would not have made any difference in the outcome. That is not the law. This is why where, as here, counsel is effectively absent, there is a denial of counsel and prejudice is presumed. State ex rel. Daniel v. Legursky, 195 W.Va. 314, 325, 465 S.E.2d 416, 427 (1995). Contrary to the State's argument, in such circumstances, it matters not whether counsel could have said anything to mitigate the sentence. State's Brief 17.

Since this constitutional error is evident, the circuit court's judgment should be reversed and the case remanded for resentencing. Alternatively, it should be remanded for findings of fact and conclusions of law the habeas court failed to make.

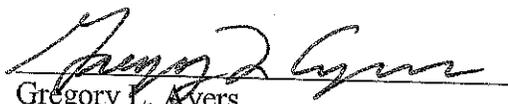
RELIEF REQUESTED

For the foregoing reasons, McLaurin respectfully requests that the order and judgment of the Kanawha County Circuit Court be reversed and his case remanded to the circuit court to grant the petition for writ of habeas corpus and order a new trial. Alternatively, McLaurin requests the Court to remand the case to the circuit court to make findings of fact and conclusions of law on the issue of denial of a competency examination. On the issue of denial of counsel at sentencing, McLaurin requests that the case be remanded for resentencing, or, alternatively, for findings of fact and conclusions of law. McLaurin further requests the Court to vacate one of his convictions and sentences for first-degree sexual assault of J.T. by sexual intercourse.

Respectfully submitted,

JOHN MCLAURIN

By Counsel


Gregory L. Myers
Deputy Public Defender
W.Va. Bar No. 7824
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 558-2323

Counsel for Appellant

CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on the 27th day of April, 2006, I sent via U.S. Postal Service a copy of the foregoing Appellant's Reply Brief to Barbara H. Allen, Managing Deputy Attorney General, Attorney General's Office, 1900 Kanawha Boulevard East, Room E-26, Charleston, WV 25305.


Gregory L. Ayers
Counsel for Appellant