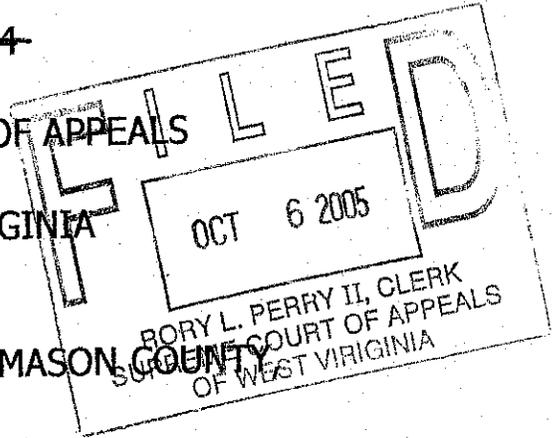


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CASE NO. ~~051014~~

IN THE SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA



FROM THE CIRCUIT COURT OF MASON COUNTY

WEST VIRGINIA

CASE No. 98-F-21

STATE OF WEST VIRGINIA
Plaintiff Below – Respondent

VS.

ALLEN D. WAUGH,
Defendant Below – Petitioner

BRIEF OF PETITIONER

Counsel for Petitioner
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P E T I T I O N
TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

KIND OF PROCEEDING AND NATURE OF THE RULING
OF THE CIRCUIT COURT

This is an appeal from a criminal conviction wherein the Appellant was convicted of the offense of Murder in the Second Degree.

BACKGROUND

On December 20, 1997, the Appellant was intoxicated in a bar in Mason County, West Virginia. After an argument with the victim, Ronald Dale Plumley, the Appellant pulled a gun and shot the victim in the chest, killing him. The Appellant then left the scene and turned himself in the next day. According to Appellant, he did not remember any of the events that occurred the night before. The Appellant was charged with Murder and convicted of Murder in the Second Degree by the Circuit Court of Mason County, West Virginia.

STATEMENT OF FACTS OF THE CASE

1. Appellant, Allen D. Waugh, was convicted of the offense of Murder

in the Second Degree in the Circuit Court of Mason County, West Virginia, on the 24th day of August 1999.

2. The Circuit Court of Mason County sentenced Appellant to a definite term of thirty (30) years by Order entered on the 15th day of May 2000.

3. Appellant's counsel, Damon B. Morgan, filed a Notice of Intent to Appeal on August 15, 2000.

4. On or about November 29, 2000, Appellant's counsel, Damon B. Morgan and David Nibert, filed a Motion to Extend Time To File Petition for Appeal. Counsel stated that grounds for said Motion were the Order of Judgment finding the Appellant guilty had not been entered by the Court and that due to both attorneys who were counsel of record being elected to public office, they could not represent the Appellant after December 31, 2000. The Court granted the Motion and Appellant was given an additional two (2) months which was a total of six (6) months from July 31, 2000, by Order entered on November 29, 2000.

5. On December 19, 2000, the Circuit Court of Mason County, West Virginia, entered an Order relieving Damon B. Morgan and David Nibert as counsel for the Appellant because both had been elected to offices that would not permit them to engage in the private practice of law.

6. On December 19, 2000, Daniel S. Corey, was appointed to represent the Appellant by Order of the Circuit Court of Mason County, West Virginia.

7. Daniel S. Corey filed a Notice of Intent to Appeal and Request for Transcripts on January 29, 2001.

8. On April 2, 2001, Daniel S. Corey filed a Motion for Extension of Time for Petition of Appeal. Said Motion was granted by Order entered Nunc Pro Tunc, April 2, 2001, which said Order extended the deadline for filing an appeal from May 30, 2001, to July 30, 2001.

9. On November 26, 2002, counsel, Daniel S. Corey, filed a Motion to Withdraw as Counsel and stated that the attorney/client relationship had deteriorated to the point that he could not effectively represent the Appellant on his appeal issues. Said Motion was granted by Order entered on the 27th day of November 2002, and Kevin W. Hughart was appointed as counsel for Appellant by the same Order.

10. On or about September 4, 2003, Appellant filed an Amended Petition under W.Va. Code §53-4A-1 for Writ of Habeas Corpus alleging that Appellant's prior counsel, Daniel S. Corey, failed to file a petition for appeal in Appellant's case. The Special Prosecutor, Christopher C. McClung, filed an Amended Answer to Appellant's Writ stating that no direct appeal from the Appellant's conviction had ever been filed with the West Virginia Supreme Court of Appeals and recommending to the Court that the Appellant be re-sentenced so that his direct appeal period would re-commence for current counsel to file his notice of intent to appeal pursuant to Rule 37 of the Rules of Criminal Procedure.

11. The Circuit Court of Mason County, West Virginia, set the matter for sentencing on December 10, 2004.

12. On December 10, 2004, the Circuit Court of Mason County, West Virginia re-sentenced the Appellant to a definite term of imprisonment of thirty (30) years for the offense of Murder in the Second Degree.

13. On January 7, 2005, Kevin W. Hughart, counsel for Appellant, filed a Notice of Intent to Appeal with the Circuit Court of Mason County, West Virginia.

ASSIGNMENT OF ERROR RELIED UPON AND THE MATTER DECIDED

IN THE CIRCUIT COURT

1. The Court committed error by permitting a Mason County Sheriff's Deputy to serve as a bailiff when said Deputy was a key witness in the Appellant's trial.

2. The Court committed error in that it failed to remain impartial, and caused prejudice to the Appellant's case by conducting a direct examination of a witness in front of the jury in an attempt to rehabilitate that witness' credibility.

POINTS AND AUTHORITIES RELIED UPON

1. **State v. Kelley, 192 W.Va.124, 451 S.E.2d 425 (1994)**

A defendant's constitutional rights to due process and trial by a fair and impartial jury, pursuant to amendment VI and amendment XIV, section 1 of the *United States Constitution* and article III, sections 10 and 14 of the *West Virginia*

Constitution are violated when a sheriff, in a defendant's trial, serves as a bailiff and testifies as a key witness for the State in that trial.

2. **West Virginia Rules of Evidence, Rule 614(b)**

In jury trials the Courts interrogation of a witness shall be impartial so as not to prejudice the parties.

3. **State vs. Crockett, 164 W.Va. 435, 265-S.E.2d 268 (1979)**

A trial judge should not comment on the weight of evidence bearing upon any factual matters submitted to the jury for decision. A violation of this general rule may constitute reversible error.

4. **State vs. Starcher, 168 W.Va. 144, 282 S.E.2d 877 (1981)**

It is improper for the trial court to invade the province of the jury by examining witnesses extensively and by engaging in the rehabilitation of them.

5. **Alexander ex rel Ramsey v. Willard, 208 W.Va. 736, 542 S.E.2d 899 (2000)**

A judge may ask questions for the purpose of clearing up points that seem obscure and supplying omissions which the interest of justice demands, but it is not proper that he conduct an extended examination of any witness.

ARGUMENT

I. The Court erred by permitting a deputy sheriff to serve as bailiff when he was also a witness in the trial.

Immediately after the jury was impaneled, Damon B. Morgan, counsel for Appellant informed the Court that he was objecting to the entire jury panel.

Counsel had observed Deputy R. L. Bennett, who was listed as a witness by the State, escorting jury members into the jury room. He was also operating the metal detector in front of the court room. The Court inquired as to how many jurors Deputy R. L. Bennett had come in contact with and Counsel informed the Court that he had seen him in contact with two jurors, however, Counsel had not been present at all times. The Deputy had also been observed in the jury room with the jurors. Diana Johnson, Mason County Prosecutor, then informed the Court that she had instructed Deputy R. L. Bennett to not have any contact with the jury other than when he was operating the metal detector. However, Ms. Johnson did not observe what Mr. Morgan had observed. Judge Watt determined that he was not with the jurors long enough to taint the jury. Mr. Morgan objected to Judge Watt's decision.

In **State v. Kelley**, 192 W.Va. 124, 451 S.E.2d 425 (1994), this Court ruled "[T]hat a defendant's constitutional rights to due process and trial by a fair and impartial jury, pursuant to amendment VI and amendment XIV, section 1 of the *United States Constitution* and article III, sections 10 and 14 of the *West Virginia Constitution* are violated when a sheriff, in a defendant's trial, serves as a bailiff and testifies as a key witness for the State in that trial."

In **Kelley**, a sheriff served as bailiff through all of the trial proceedings due to the fact that he was the only available officer to serve as bailiff. In the instant case, Deputy R. L. Bennett, was instructed by the prosecutor to not have any contact with the jury other than the fact he was running the metal detector in front of the court room. However, Deputy R. L. Bennett was seen by defense

counsel escorting at least one juror to the jury room and in contact with at least two jurors. At the time Deputy R. L. Bennett was in the jury room with the juror he was escorting, defense counsel stated to the Court that from the noise coming from the jury room, there were other jurors present. The Court inquired as to what testimony Deputy R. L. Bennett was going to give. The Prosecutor informed the Court that Deputy R. L. Bennett was the first officer on the scene of the murder and that he was present at the scene by himself for approximately 15 minutes to half an hour before other officers arrived. The Court decided that from what the Court was hearing, it was not enough to taint the jury and asked defense counsel if he had made the motion for other purposes. Defense counsel informed the Court that the motion was made to preserve the record and to note that he was objecting to the Court's ruling.

This Court, making reference to said rule in *Kelley*, stated that "The *Kennedy* case suggests that the court and its staff carry an aura of credibility. By this clearest analogy, if the judge presiding over the trial may not testify at that trial, the bailiff should be similarly restrained."

Appellant believes that even though Deputy R. L. Bennett may not have had the exposure to the jury that is referenced in the cases cited herein, the fact that he took it upon himself to make himself available to the jury, and in so doing ingratiated himself with the jury by being available and helpful, Deputy R. L. Bennett testified in front of this jury carrying with him an aura of credibility as being an officer of the court. Therefore, it is reasonable to believe that his testimony would be more credible to the jury than that of the Appellant; other

law enforcement officers or other lay witnesses who were subpoenaed to testify in this trial. Deputy R. L. Bennett was the first officer to arrive at the scene of the shooting and therefore his testimony was very influential in setting the scene for the rest of the testimony that was given by the other officers who investigated the incident. Since Deputy R. L. Bennett was already acquainted with the jurors, it would be reasonable to assume that the jurors would place more weight on his testimony than if they had not had occasion to become acquainted with Deputy R. L. Bennett.

Appellant believes that due to Deputy R. L. Bennett's interaction with the jurors as a bailiff, even if for a short time, said interaction lended such an aura of credibility to Bennett's testimony that, in all probability, the jury placed an inordinate amount of credibility on said Bennett's testimony.

II. The Court committed error by conducting a direct examination of a witness in an attempt to rehabilitate that witness' credibility.

The victim's mother, Diane Plumley, was called as a witness by the State of West Virginia. On direct examination the witness stated that she saw Allen Waugh pull the gun and shoot her son. When she was cross examined on that issue her attention was directed to the statement she gave Officer Peterson on the morning of the shooting. The witness had told Officer Peterson "No, I didn't see the gun. I just seen him when he was reaching back to get it."

Defense counsel went on to question the witness about whether she had heard the victim talking to the Appellant. The question was asked: "Just a couple more questions, Miss Plumley. There was an argument between your son and Allen Waugh that was going on just before the shot was fired, isn't that right?"

A. I wouldn't have no idea about that."

Q. "Let me put it this way. Your son was talking to Allen Waugh or they were talking to one another just before this shot was fired, isn't that right?"

A. "I don't know nothing about that neither."

Q. I'm going to hand you the statement. Officer Peterson asked you, "Okay, when you were holding the drink, did you hear your son exchanging words with Mr. Waugh?" Your answer was, "I heard them. I heard them talking. But I - - there was no voices raised." Peterson said, "Didn't sound like a very heated argument or anything?" And your answer was, "Huh-uh." He said again, "Didn't sound like it was a heated argument or anything?" And you said, "No." Then he asked you if you saw the gun. And you say no, is that right? Is that what you told Officer Peterson at 3:30 in the morning on December 20, 1997?"

A. "Yes, sir."

Q. "So there was some level of conversation that was going on between your son and Allen Waugh right before the shot was fired, right?"

A. "If it was, it had to be before I walked up to the bar."

Q. "Well, when you're telling Officer Peterson that you heard them talking, was that before you walked up to the bar that you heard them talking? Or was it after you got up to the bar that you heard them talking?"

A. "It had to be after I got up to the bar."

After further questioning of the witness by the Prosecutor and Defense counsel the Court then said, "All right, Mrs. Plumley, I want to ask you some questions. What is the date of your birth."

A. "10/15/53."

Q. "Wait a minute now. Ten What?"

A. "10/15/53."

Q. "How old were you on this night of December?"

A. "Forty-three."

Q. "And do you have additional sons as well as Shawn and your son that was killed? Do you have any more boys?"

A. "No, sir."

Q. "On that December day, do you recall what time you got up in the morning/ The usual time?"

A. "Yes."

Q. "What time was that?"

A. "About between 7:00 and 7:30."

Q. "What time?"

A. "7:00, 7:30."

Q. "Okay. Did you do your housework that day? What did you do on that day? Do you work?"

A. "No. I was living with my cousin at the time."

Q. "All right. And I think you told me but I lost my notes. About what time did you get down to the bar?"

A. "Between 10:30 and 11:00."

Q. "All right. And the shooting occurred when to your best knowledge?"

A. "Five till 1:00."

Q. "Almost 1:00?"

A. "Yes, sir."

Q. "You had been down there a couple hours, right?"

A. "Yes, sir."

Q. "And in that process - - and I hate to remind you - - you lost a son, didn't you?"

A. "Yes, sir."

Q. "Saw your son shot down, is that right?"

A. "Yes, sir."

Q. "You went to the hospital?"

A. "Yes, sir."

Q. "With your son?"

A. "Yes, sir."

Q. "I dare say you prayed on the way?"

A. "Yes, sir."

Q. "And how long was your son in the hospital before they told you that he was dead? Got any idea?"

A. "It was about an hour and a half to two hours."

Q. "Then the officer, the deputy began to quiz you and ask you questions?"

A. "Yes, sir."

Q. "How long had your son been dead when the officer questioned you? Hour? Two hours? What would you tell me?"

A. "I'd say between three hours."

Q. "Were you possessed at that time of all your faculties in view of what you went through?"

A. "I don't understand the question."

Q. "All right. Did you know everything you were saying when you tried to answer the deputy's questions?"

A. "I did the best I could do."

Q. "Pardon?"

A. "I did the best I could do."

Q. "Well, were you level headed and calm and collected?"

A. "Not with my son lying there dead, no."

Q. "Did the deputy offer to question you later after you could go home and get some rest and get your head screwed on right?"

A. "When he took me to the room, I asked him if I could wait until the next morning. And he said no."

Q. "It had been - - what is it, about 20 hours since you got any rest? You got up at 7:00 and he questioned you at 3:00."

A. "Yes, sir."

Q. "All right. That's all the questions I have. Any more questions?"

It was apparent from the Court's line of questioning that the Court was trying to rehabilitate the witness after the discrepancies in her testimony at court and her statement to the deputy which was given shortly after the killing. This Court stated in **State of West Virginia vs. Crockett**, 164 W.Va.435, 265 S.E.2d 268 (1979), "It is well-settled that a trial judge should not comment on the weight of evidence bearing upon any factual matters submitted to the jury for decision and that a violation of this general rule may constitute reversible error." (citations omitted) It is further stated in Rule 614(b) of the West Virginia Rules of Evidence, "The court may interrogate witnesses, whether called by itself or by a party, but in jury trials the court's interrogation shall be impartial so as not to prejudice the parties." This Court also stated in **Alexander ex rel Ramsey v. Willard**, 208 W.Va. 736, 542 S.E.2d 899 (2000), that "[a] judge may ask questions for the purpose of clearing up points that seem obscure and supplying omissions which the interest of justice demands, but it is not proper that he conduct an extended examination of any witness." In **State of West Virginia vs. Starcher**, 168 W.Va. 144, 282 S.E.2d 877 (1981), this Court, making reference to **Crockett**, stated "[W]e have recognized that it is improper for the trial court to invade the province of the jury by examining witnesses extensively and by engaging in the rehabilitation of them."

It was clear from the Court's questions to the witness that the Court was attempting to rehabilitate the witness by questioning her in a manner as to explain the discrepancies between her statement to the deputy on the night of the murder and her testimony at the trial. Furthermore, the Court's questions appeared to be designed to garner pity from the jury and in essence cause the jury to disregard any testimony from the witness.

CONCLUSION

The Circuit Court of Mason County erred when it did not dismiss the jury panel when it was brought to the Court's attention that the jury, in all probability, had been tainted. This taint was caused by one of the State's key witnesses, Deputy R. L. Bennett, coming in contact with the jurors. Deputy R. L. Bennett took it upon himself to escort at least two, and possibly more, jurors to the jury room. This action in all probability caused the jurors to look upon Deputy R. L. Bennett in a favorable manner which would have affected the weight and credibility each juror placed upon Deputy R. L. Bennett's testimony.

The Circuit Court of Mason County erred when it interrogated a witness in an attempt to rehabilitate that witness to the jury.

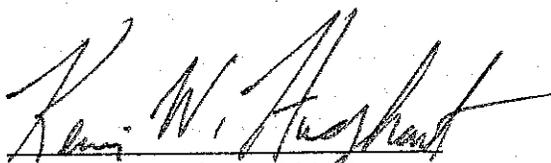
This Court has set forth the premise that "Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the

trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error. **State v. Crockett**, 164 W.Va. 435, 265 S.E.2d 268 (1979). The errors of the Court in the trial of this matter were all errors that more likely than not prejudiced the jury in favor of the State, thus preventing the Appellant from receiving a fair trial.

PRAYER FOR RELIEF

The Appellant respectfully prays that this Supreme Court of Appeals rule that the errors committed by the Court in this matter are reversible errors; that the totality of the errors would, in all probability, have prejudiced the jury against your Appellant.

Appellant prays that this Court remand this case to the Mason County Circuit Court and Order a new trial to be held in this matter and grant unto your Appellant such other, further and general relief as may seem proper to this Court.



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By Counsel

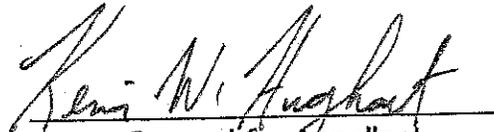
CERTIFICATE OF SERVICE

I, Kevin W. Hughart, hereby certify that I have served the BRIEF OF PETITIONER on the 30th day of September 2005, by First Class, United States

Mail to the following persons.

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