

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

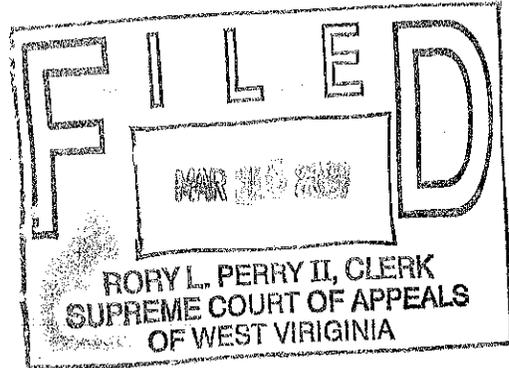
-CHARLESTON-

In the Matter of:

**RICHARD ALLEN HAINES,
Appellant,**

vs.

**STATE OF WEST VIRGINIA,
Appellee.**



Case No.: 33304

**Circuit Court of Hampshire County, WV
05-F-30**

APPELLANT'S BRIEF

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 1. **THE CIRCUIT COURT ERRED IN AMENDING THE INDICTMENT
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IN THE CASE HAD BEEN COMPLETED. ONLY THE GRAND JURY
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S.E.2d 281, 218 W.Va. 519 (2005); *State v. Adams*, 456 S.E.2d 4, 193
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STATEMENT OF THE CASE

In this delivery of a controlled substance case involving criminal defendant, Richard Allen Haines, the Circuit Court of Hampshire County erred in affirming the jury's verdict of guilty when the evidence presented at trial, even considered in a light most favorable to the prosecution, failed to show that the defendant had delivered methamphetamine to Katrina Hartman in Hampshire County, West Virginia. Further the Circuit Court of Hampshire County erred in permitting and making a substantive amendment to the indictment returned by the Hampshire County Grand Jury on May 9, 2005 during the trial of the matter in October, 2005.

On May 9, 2005 the defendant was directly indicted by the Hampshire County Grand Jury on one count of delivery of a schedule I controlled substance, to-wit: methamphetamine. On May 10, 2005 the Defendant was appointed counsel and arraigned on the indictment. On May 10, 2005 counsel for the Defendant filed various motions on behalf of the Defendant including a Motion to Dismiss the Indictment.

During jury selection on October 11, 2005 the Court instructed the jury as to the crime that the Defendant was to be tried was delivery of a schedule I controlled substance, to-wit: methamphetamine. During Opening Statements counsel reference that the elements of this crime require the prosecution to prove that the defendant delivered a schedule I controlled substance to Katrina Hartman in Hampshire County, West Virginia. Following opening statements of both parties, the State of West Virginia moved to amend the indictment to reflect that methamphetamine is a schedule II controlled substance and not a schedule I controlled substance as alleged in the original indictment. The Circuit Court did permit this amendment over the objection of

the Defendant. The Court did instruct the jury in it's charge on October 12, 2005 that the elements of the crime required the State of West Virginia to proved that the defendant delivered a schedule II controlled substance to Katrina Hartman in Hampshire County, West Virginia.

No scientific or expert testimony was produced by the prosecution during the trial of the substance that was allegedly delivered to Katrina Hartman by the defendant. No witness testified during the trial of the case that they knew the substance delivered to Katrina Hartman by the defendant was methamphetamine or that it was any controlled substance as defined by West Virginia Code Chapter 60A, Article 4, et. seq. The Defendant did not testify at trial.

The jury found the defendant guilty at the trial on October 12, 2005 of delivery of a schedule II controlled substance, to-wit: methamphetamine to Katrina Hartman in Hampshire County, West Virginia. The defendant filed a motion in arrest of judgment, motion for post-verdict judgment of acquittal; and motion for new trial with notices of hearing on October 21, 2005. These motions were denied by the Circuit Court of Hampshire County, West Virginia.

STATEMENT OF FACTS

1. In May, 2005 the Hampshire County Prosecuting Attorney presented information directly to the Hampshire County Grand Jury seeking an indictment on one count of involuntary manslaughter and one count of delivery of a schedule I controlled substance, to-wit: methamphetamine against the Appellant. All offenses allegedly took place in August, 2004.
2. The Hampshire County Grand Jury returned NO TRUE BILL on the count of involuntary manslaughter and a TRUE BILL indictment on one count of delivery of a schedule I controlled substance, to-wit methamphetamine against the Appellant on May 9, 2005.
3. On May 10, 2005 the matter came on for arraignment and the Defendant retained counsel. The Appellant further filed various motions during his arraignment including a motion to dismiss the indictment and motion for grand jury testimony.
4. On May 10, 2005 the Defendant was granted bond.
5. On September 26, 2005, a suppression hearing was held regarding the admissibility of statements taken from the Appellant by the West Virginia State Police and the Hampshire County Sheriff's Office. The Court continued the matter for further hearing on October 11, 2005 because one of the State's witnesses was unavailable for the hearing.
6. On October 11, 2005 a jury was selected for the trial of the matter to be held on October 12, 2005. During the jury selection the Circuit Court of Hampshire County informed the jurors that the indictment alleged that the Appellant

delivered a schedule I controlled substance, to-wit: methamphetamine to Katrina Hartman in Hampshire County, West Virginia.

7. On October 11, 2005 the Court continued to hear testimony at the suppression hearing regarding the admissibility of statements taken from the Appellant by the West Virginia State Police and the Hampshire County Sheriff's Office. The Circuit Court of Hampshire County ruled the statements admissible during the trial of the matter.
8. On October 12, 2005 the trial of the matter was commenced. During the opening statements the State of West Virginia made reference to methamphetamine being a schedule II controlled substance. The Appellee made reference to the instruction of the Circuit Court of Hampshire County, West Virginia that the offense alleged that the defendant had delivered a schedule I controlled substance, to-wit: methamphetamine and other issues related to the elements of the offense identified by the Circuit Court of Hampshire County.
9. Following the opening statements the State of West Virginia made a motion to amend the indictment to read that the Defendant had delivered a schedule II controlled substance, to-wit: methamphetamine. The Defendant objected. The Circuit Court of Hampshire County amended the indictment over the objection of the defendant.
10. During the trial of the case the State of West Virginia attempted to admit the toxicology report of Katrina Hartman through the testimony of Deputy McHiggins. The Defendant objected. The Circuit Court of Hampshire County sustained the objection of the Defendant and the toxicology report was not admitted.

11. During the trial of the case no scientific or expert evidence was presented to the jury regarding the identity of the substance allegedly delivered by the Defendant to Katrina Rae Hartman.
12. During the trial of the case no evidence was presented to the jury that the substance allegedly delivered by the Defendant to Katrina Rae Hartman was a controlled substance or methamphetamine.
13. The Defendant moved for a directed verdict at the close of the State of West Virginia's case-in-chief. Motion Denied.
14. The Defendant did not testify or call any witnesses.
15. The jury returned a verdict of guilt to delivery of a schedule II controlled substance, to-wit: methamphetamine.
16. The Defendant filed a motion for a new trial pursuant to Rule 33 of the WV Rules of Criminal Procedure; motion for post-verdict judgment of acquittal pursuant to Rule 29(c) of the West Virginia Rules of Criminal Procedure.
17. The Circuit Court of Hampshire County denied the motions on November 8, 2005.
18. The Circuit Court ordered a sixty-day evaluation prior to sentencing.
19. On March 9, 2006 the Court sentenced the Defendant to 1-5 years in the penitentiary.
20. On March 23, 2006 an amended sentencing order was entered.
21. The Defendant filed a Notice of Intent to appeal within the appropriate time standards.
22. The Defendant filed a Motion for Reconsideration of Sentence.

23. On July 8, 2006 the Circuit Court of Hampshire County granted an extension of time for the Defendant to file his Petition(s) for Appeal until September 23, 2006.
24. The Circuit Court held a hearing on the Defendant's Motion for Reconsideration of Sentence on August 15, 2006. The motion was Denied.

AUTHORITIES RELIED ON

1. *State v. Cook*, 515 S.E.2d 127, 204 W.Va. 591 (1999).
2. *State v. Guthrie*, 461 S.E.2d 163, 194 W.Va. 657 (1995).
3. *State v. Legg*, 625 S.E.2d 281, 218 W.Va. 519 (2005)
4. *State v. Adams*, 456 S.E.2d 4, 193 W.Va. 277 (1995)
5. *State v. McGraw*, 85 S.E.2d 849, 140 W.Va. 547 (1955).
6. West Virginia Code Chapter 60A, Article 4, Section 401(a)(ii)

ASSIGNMENT OF ERROR

- I. **WHETHER THE CIRCUIT COURT ERRED IN AMENDING THE INDICTMENT AFTER THE JURY HAD BEEN SEATED AND OPENING STATEMENTS IN THE CASE HAD BEEN COMPLETED WHEN ONLY THE GRAND JURY HAS THE POWER TO AMEND AN INDICTMENT.**

ARGUMENT

I. THE CIRCUIT COURT ERRED IN AMENDING THE INDICTMENT AFTER THE JURY HAD BEEN SEATED AND OPENING STATEMENTS IN THE CASE HAD BEEN COMPLETED. ONLY THE GRAND JURY HAS THE POWER TO AMEND THE INDICTMENT.

Syllabus Point 1 of *State v. Adams*, 456 S.E.2d 4, 193 W.Va. 277 (1995) states that:

A defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on felony offenses for which a grand jury has returned an indictment.

In this case, the Appellant stands convicted of delivering the schedule II controlled substance, methamphetamine, to Katrina Rae Hartman. The Indictment in this matter and its wording stand alone as the sole record to the defendant of what the grand jury actually considered in determining whether to return an indictment on this count. While the defendant requested the grand jury testimony several times during the pendency of this action the Circuit Court of Hampshire County denied those requests. It is uncontested that the form and evidence considered by the jury contained the language “[d]eliver a Schedule I controlled substance, namely, methamphetamine”. At no place on the indictment does it say anything about methamphetamine being a schedule II controlled substance.

The Defendant moved to dismiss the indictment alleging the indictment was invalid under the United States Constitution and West Virginia Constitution. The Circuit Court of Hampshire County denied the motion. Syllabus point 1 of *State v. Legg*, 625 S.E.2d 281, 218 W.VA. 519 (2005) states that the review of sufficiency of an indictment is reviewed de novo.

The Circuit Court of Hampshire County instructed the jury that the indictment charged the defendant delivered a Schedule I controlled substance, namely, methamphetamine to Katrina Hartman. Counsel argued that the State should be held to it's burden of proving the indictment as instructed by the Court and the State during jury indoctrination and opening statements. After opening arguments the Court granted a motion to amend the indictment by the State and changes the indictment to make it allege methamphetamine is a Schedule II controlled substance over objection of the defendant. This is contrary to what the Court has instructed the jury at indoctrination and the plain language of the indictment.

Syllabus Point 2 of *State v. Adams*, 456 S.E.2d 4, 193 W.Va. 277 (1995) states that "Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury." This was a substantial amendment as there is a difference between Schedule I and Schedule II controlled substances. They are different lists of drugs and more importantly they are one of several schedules contained in West Virginia Code that could have been alleged by the State of West Virginia. It is important that information presented to the grand jury and contained in the indictment be the same information that the Defendant is held to defend at trial.

An indictment can only be made by a grand jury and the Circuit Court has no

authority to amend the substance of the indictment returned by a grand jury. Syllabus point 3 of *State v. McGraw*, 85 S.E.2d 849, 140 W.VA. 547 (1955). The amendment of the indictment was not proper after the court had instructed the jury as to the alleged schedule of methamphetamine pursuant to the indictment; the argument of counsel as to the indictment and its discrepancy with the law of the State of West Virginia setting forth the correct schedule for methamphetamine to the jury. The amendment caused harm to the Defendant in that it affected his credibility with the jury.

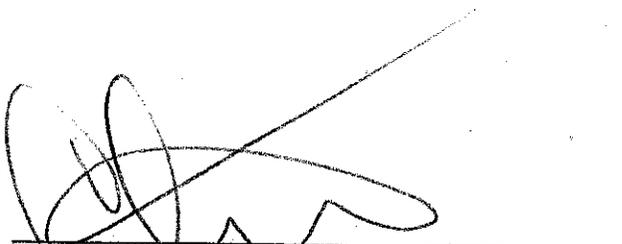
CONCLUSION

For the reasons mentioned above, the conviction and sentence in this case must be vacated; the case remanded for a judgment of acquittal; and the Appellant ordered released.

Richard Allen Haines

Appellant

By Counsel:



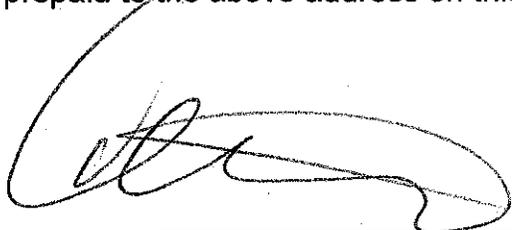
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CERTIFICATE OF SERVICE

I, Christopher A. Davis, counsel for the Appellant, hereby certify that I have served a true and complete copy of the foregoing Brief of Appellant upon

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Charleston WV 25305

by delivering a copy of the same by regular United States Mail, First Class, postage prepaid to the above address on this 13th day of March, 2007.



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