
NO. 33321

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

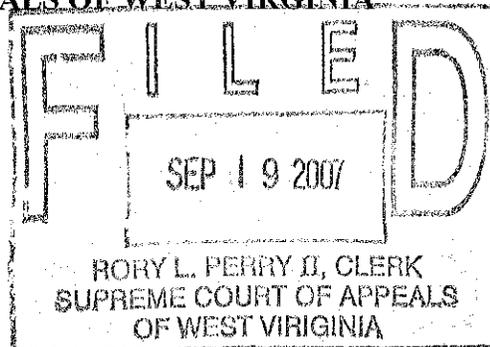
GARY ALLEN GIBSON,

Petitioner below, Appellee,

v.

THOMAS McBRIDE, Warden,
Mt. Olive Correctional Facility,

Respondent below, Appellant.



APPELLANT'S REPLY BRIEF AND BRIEF IN
OPPOSITION TO APPELLEE'S CROSS APPEAL

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I.

INTRODUCTION

The Appellee's brief reads as if this Court has regularly applied the doctrine of cumulative error to state habeas proceedings: In fact, it has never done so. Nor has the United States Supreme Court. *See Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006) ("Habeas Petitioner's cumulative error claim . . . was not cognizable on habeas review, as the United States Supreme Court has not yet spoken on issue.").

The Eighth Circuit Court of Appeals has rejected the doctrine altogether. *United States v. Robinson*, 301 F.3d 923, 925 n.3 (8th Cir. 2002) (the numerosity of alleged deficiencies does not demonstrate by itself the necessity for habeas relief). Several other circuits have ruled that the cumulative error doctrine may only be applied in federal habeas proceedings if each of the errors

constitutes harmless constitutional error. *See Coble v. Quarterman*, Case No. 01-50010, 2007 WL 2306905, * 8 (5th Cir. 2007) (federal habeas relief under cumulative error doctrine is only available if each error is of a constitutional dimension); *but see Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007) (cumulative errors are not harmless if they had a substantial and injurious effect on determining the jury's verdict).

The reasoning behind the rejection of this doctrine was best expressed in *Derden v. McNeel*, 978 F.2d 1453, 1457-58 (5th Cir. 1992):

“Cumulative error” is an infinitely expandable concept that, allowed to run amok, could easily swallow the jurisprudence construing specific guarantees of the Bill of Rights and determining minimum standards of procedural due process . . . The legal certainty afforded by rules drawn from the specific Bill of Rights provisions related to criminal law could then yield to the subjectivity of fundamental fairness determinations

In the case at bar, the lower court ignored well established distinctions between appellate and post-conviction review. Because of this, the court revisited ordinary trial court rulings. It then arbitrarily accumulated these non-constitutional trial court errors, finally finding that they deprived the Appellee of a fair trial.

By doing so, the court afforded itself the leeway to second-guess the trial court's judgment 20 years after the original trial. Using nothing but sheer force of numbers, the habeas court then found a constitutional violation. The court's order embodies the sort of *post hac*, micro-management of the trial process which undermines the purposes of post-conviction review. *See Pethel v. McBride*, 219 W. Va. 578, 588, 638 S.E.2d 727, 737 (2006) (habeas is not a second appeal); *State ex. rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979).

II.

ARGUMENT

A. APPELLEE'S CLAIM THAT THE APPELLANT MISREPRESENTED THE FACTS IS NOT TRUE.

The Appellee first claims that the Appellant misrepresented the record. (Appellee's Brief at 3.) Indeed, using the strongest language he can muster he claims that he takes "great exception" to Appellant's alleged misrepresentations. The Appellee's allegations do not comport with the record.

The Appellee first denies that he was a member of the Aryan Brotherhood, and claims that this issue was never disputed by the State. The record does not bear him out. Beginning with its opening statement the State argued that Gibson, along with his co-conspirators Gary Gillespie, Paul Brumfield, David Morgan, and John Perry belonged to the Aryan Brotherhood. (Tr. 61.) It claimed they murdered Lehman because he belonged to a rival gang. The State repeated its claim during summation. (Tr. 557.)

Ervil Bogard testified that, after being recruited by several other members of the Aryan Brotherhood, Gibson asked him if he was going to join.¹ (Tr. 153-54.) Bogard recalled Gibson telling him:

HERNDON: You say you inferred from what Mr. Gibson said for, *what exactly was it that he said that you remember?*

BOGARD: To the best of mine, it was just like encourage me, look your *okay with us*, you know. You know, *if you join*, you know, certain inmates – [Gary Gillespie] likes you, *we like you, you haven't done nothing to us. . . .*

¹Obviously, Gibson was a free-lance recruiter for the Brotherhood, or he was just curious about Bogard's social calendar.

(Tr. 154; emphasis added.)

Bogard repeated this testimony on cross-examination:

BOGARD: Right. It was more like instead of telling the whole story you can say just one line and then key on it. *Are you going to join us*, are you going to join, *are you with us*, something to that effect. I knew what he was talking about.

(Tr. 180; emphasis added.)

Clearly, the jury believed his testimony over the Appellee's. It is the jury's job to make these credibility determinations, not this Court's.

Bogard testified that, on the day of the murder, he heard David Morgan call to Danny Lehman, asking him to come to the back of the tier. Upon Lehman's arrival Bogard saw Gillespie grab hold of him while Perry made a stabbing motion towards Lehman's eye and Brumfield made a stabbing motion towards Lehman's chest. (Tr. 160-61.) Once Gillespie grabbed Lehman, Bogard saw Gibson and Morgan walk to the front of the tier. (Tr. 162, 166.) Corrections officer Roland Day testified that he found Gibson, Gillespie and Brumfield closest to Lehman. (Tr. 85-86.) All three had their hands in the air. (Tr. 86.) Later, he found two shanks lying next to Lehman's body. (Tr. 87.)

Former Moundsville prisoner Wallace Jackson, Jr., testified that the Appellee, along with John Perry, Paul Brumfield, David Morgan and Gary Gillespie came to his cell door. (Tr. 184.) Gillespie handed Jackson a knife and told him to hide it under his pillow. (Tr. 185.) Perry then told every member of the conspiracy where to stand. (*Id.*) Gillespie and co-conspirator David Morgan were told to stand to the left of Jackson's cell door. (Tr. 186-87.) While they were waiting for Lehman, all of the conspirators, including the Appellee, began talking about killing Lehman. (Tr.

185.) Jackson saw Gibson standing 15 feet away from Lehman with a knife in his hand while the murder took place.² (Tr. 189, 191.)

The Appellee's sufficiency of the evidence argument ignores these facts. A juror could reject the Appellee's claim that he happened to be at the wrong place, at the wrong time, with a knife in his hand, while fellow members of his gang executed a member of a rival gang and still be well within the bounds of reason.

B. INMATE BOGARD'S TESTIMONY WAS ADMISSIBLE AS LAY OPINION TESTIMONY.

The Appellee also claims that Bogard's testimony relating to Gibson's request to join the Aryan Brotherhood violated Appellee's right to a fair trial, and effective assistance of counsel. The Appellee is wrong on both counts.

The day before Lehman was murdered, five members of the Aryan Brotherhood approached Bogard. Two of them told him about their plan to murder Lehman, and asked him to act as a cutoff man. All four asked Bogard if he wanted to join the Brotherhood. Two of the conspirators, David Morgan and John Perry, linked participation in the conspiracy with membership in the Brotherhood. (Tr. 148-53.)

Because of his prior experiences and observations Bogard knew that Lehman's gang and the Brotherhood were on the verge of clashing:

²Once Gillespie grabbed Lehman, Gibson and Morgan walked towards the front of the tier in order to cut off Lehman's ally Michael McMillion. (Tr. 188.) According to a contemporaneous Report of Criminal Investigation prepared by the Department of Public Safety: "Danny Worley and Michael McMillion then attempted to come to Lehman's aid. McMillion was cut off and stabbed by Gary Gibson . . . and Paul Brumfield Worley was cut off and stabbed by Gary Gibson . . . and John Perry." (R. 238.)

The trial court did not admit evidence regarding Gibson's role in these two stabbings.

The battle had to start sometime, everybody knew that. I mean, it was like when you have two different groups that close together and you can't get away from each other, and they're that far apart on what they want to do there's got to be a clash, and Danny being the president, take away the head and the body fails, and that's the way I figured they were thinking then.

(Tr. 153.)

Bogard formed a reasonable opinion based on his prior experience, *i.e.*, that Gibson's invitation to join the Brotherhood was also an invitation to join the conspiracy:

Q: Did [Gibson] ask you anything else?

A: I'm like – I think that's all he said, but I implied are you going to help, because Rocky [Gibson] slept on the bottom and I was trying to get up as quick as I could to get in front of the cell with my partner in case they were after me, which I was paranoid, and I wanted somebody there to watch my back to help me out.

(*Id.*)

Defense counsel did not object to Bogard's testimony. Bogard repeated his earlier testimony on cross-examination:

A: The same thing I testified earlier to. I know what they were talking about. Whether I can remember plainly [Gibson] saying are you going to help us kill Danny or something like that, I can't say, that doesn't sound right, but what I do remember it was implied. I knew what they were talking about. You'd have to be blind and dumb not to know what they were talking about after David Morgan initiated it. [Gibson's] exact words I can't remember, but it was my understanding what they wanted from me and what they would give in return.

(Tr. 178-79.)

Bogard did not arrive at this conclusion by reading Gibson's mind, nor did he claim to have done so. He placed it into the proper context. The Appellee asked the jury to believe that the timing of Gibson's question was sheer coincidence, unconnected to the underlying conspiracy. Perhaps an

independent recruiting effort or simply idle curiosity.³ The jury's decision to reject this position was well within the bounds of reason.

A lay witness may offer opinion testimony regarding the meaning of vague or ambiguous statements, as long as it is rationally based on the perception of the witness. W. Va. R. Evid. 701. It must also be helpful to the jury in acquiring a clear understanding of the witness's testimony or the determination of a fact in issue. See *United States v. Freeman*, No. 05-50401, 2007 WL 2350657 (2007) (lay opinion testimony on meaning of terms gathered by general knowledge of investigating officer admissible.); *United States v. De Peri*, 778 F.2d 963, 977-78 (3d Cir. 1985); *United States v. Flores*, 63 F.3d 1342, 1359 (5th Cir. 1995) (co-conspirator interpretation of defendant's statements based on participation in conspiracy and understanding of terms used during conspiracy admissible as lay opinion testimony).

Admittedly, Gibson's statement appears to be clear. It is the circumstances surrounding it which makes its meaning ambiguous. Common sense suggests that members of a criminal conspiracy rarely ask a person whether he wants to join the conspiracy. Instead, they may use innocuous terms such as the gang, or the group. Testimony interpreting these seemingly innocuous terms is not *per se* inadmissible.

C. THE APPELLEE FAILED TO ALLEGE A COGNIZABLE VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The Appellee's counsel claims that he has "difficulty understanding" Appellant's claim. The Appellant has no doubt that this is true. Simply put, the Appellant claims that the habeas court

³The vast majority of Gibson's witnesses denied they knew anything about the Brotherhood. Indeed, even its co-founder claimed he did not know the names of the other members. Thus, it is doubtful that an inmate would ask another inmate about his membership status out of curiosity.

arbitrarily chose three ordinary trial court decisions, wrongly characterized them as error, although it designated each individual error as harmless the court then erroneously found that the combined effect of these non-constitutional errors resulted in a constitutional error, and, without conducting any analysis as to the harmlessness of the alleged constitutional error, found that this alleged error deprived the Appellee a fair trial.

In short, the state habeas court converted Gibson's habeas proceeding into a second appeal. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, *State ex. rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979).

The best way to resolve this matter would be for this Court to find that the trial court's rulings did not constitute an abuse of discretion. Even if this Court were to find error, the state habeas court's final order fails to set forth why these non-constitutional trial court rulings denied Gibson a fair trial. *See, e.g., Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (under due process it is not enough to claim that statements by prosecutor were wrong, have to prove so infected the trial with unfairness as to make the resulting conviction a denial of due process).

There is simply no evidence that the admission of photographs, denial of a continuance, and the trial court's failure to order, *sua sponte*, that the defense's incarcerated witnesses appear in street garb, so infected Gibson's trial as to render the guilty verdict unworthy of trust.

D. APPELLEE'S CROSS ASSIGNMENT OF ERROR IS MERITLESS.

Nowhere is the weakness of the habeas court's final order more obvious than in Gibson's cross appeal. The Appellant has already addressed each of the trial court's alleged "errors" in its original brief. (Appellant's Brief at 8-20.) But it is the fact that these issues are still in play 20 years

after Gibson's trial. These issues were raised in post-conviction motions, his petition for appeal, and a *pro se* state habeas petition filed under this Court's original jurisdiction. The trial court denied his motions and this Court refused his petitions. Gibson now seeks another chance to litigate these claims. Acceptance of his position, and reconsideration of these issue would substantially undermine interests in finality. *State ex. rel Richey v. Hill*, 216 W. Va. 155, 171, 603 S.E.2d 177, 193 (2004) (Maynard, J., concurring) (without finality the criminal law is deprived of much of its deterrent effect) quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989) (*plurality opinion*).

III.

CONCLUSION

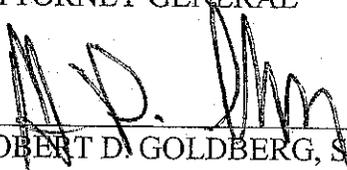
For the foregoing reasons, this Honorable Court should reverse the judgment of the Circuit Court of Cabell County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellant, do hereby certify that I have served a true and accurate copy of the foregoing "Appellant's Reply Brief and Brief in Opposition to Appellee's Cross Appeal" upon counsel for Appellee by depositing said copy in the United States mail, with first-class postage prepaid, this 19th day of September, 2007, addressed as follows:

To: R. Lee Booten, II, Esq.
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