

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

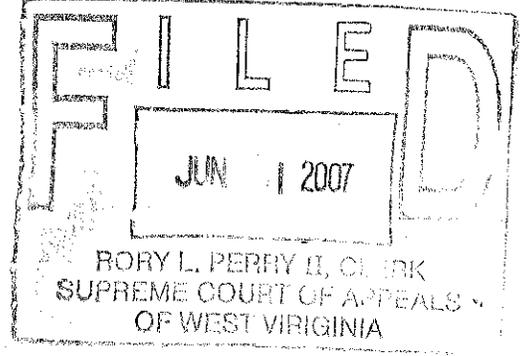
STATE OF WEST VIRGINIA,

Appellee,

v.

MINDY KEESECKER,

Appellant.



DOCKET NO. 33377

BRIEF OF APPELLANT

Submitted for Appellant by Counsel:

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KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The within is a direct appeal of criminal convictions and a sentence of multiple 1-5 year penitentiary terms. The underlying convictions are for six counts of third degree sexual assault in which the Appellant, Defendant below, was convicted of having sexual relations with a male individual who was just under 16 years of age. As discussed in greater detail, *infra*, each of the errors cited to herein were preserved upon the record of the trial in the form of written motions to suppress, or through objections lodged upon the record during the trial of the action with the exception of one which is cited herein as plain error. In addition, post-trial motions were timely filed regarding each of the issues addressed herein and ruled upon by the Court below in the matter adverse to the Appellant.

FACTS OF THE CASE

The State's purported victim, who was just under 16 years of age, (hereinafter referred to as "J.G."), apparently behaved in such a way as to cause his mother, Deborah H., to be suspicious. Deborah H. then set about secretly tape recording J.G.'s telephone calls with third parties. Neither J.G. nor the third parties were aware that they were being recorded nor gave their permission to be recorded. The substance of the telephone calls was conveyed to the West Virginia State Police. While it is unclear what precise role those telephone calls played in the initiation or development of the ensuing investigation, the State submitted notes of the contents of those telephone calls to undersigned counsel in discovery. Thereafter, J.G. was questioned by police authority resulting in an outright denial of any improper relationship with the Appellant. Thereafter, the Appellant was approached by West Virginia State Police Officers about submitting to questioning concerning the matter. Before doing so, the Appellant, through her brother, the pastor of a local church,

consulted with a second State Police Officer who was a family friend, fellow congregation member and a trusted confidant, Trooper Chuck Maynard. While not directly involved with the investigation at that point, Trooper Maynard had communication with those officers who were and reported back to the Appellant, through her minister brother, to the effect that if she would come into the State Police Office and make a "truthful"¹ statement that the matter could be laid to rest and put behind them which was clearly understood to mean that no criminal charges would be brought. The Appellant gave a substantial confession to having engaged in various sexual acts with the State's victim which the State carefully dissected, charging a specific criminal offense based upon each act alluded to. The Prosecuting Attorney also engaged in the unlawful seizure of the Appellant's computer which apparently contained certain e-mail communication with J.G.. The Prosecuting Attorney, as discussed in greater detail below also, through the use of unlawful subpoenas, obtained certain private telephone records of the Appellant. The Court below did suppress certain of those records. However, that taint upon the investigation generally remained. During closing arguments in the trial of this action, the Prosecuting Attorney made an impermissible reference to the Appellant's choice to remain silent and not testify at trial by referring to her failure to testify and refute the evidence in the case. Additionally, the Prosecuting Attorney during his closing argument made extensive references to God, religion, the Bible and the "Throne of Judgment" such as to constitute plain error when not restrained by the trial court.

ASSIGNMENT OF ERROR

1. The Court erred by permitting the Prosecutor, during closing argument, to engage

¹Because the Troopers had already received J.G.'s statement, consisting of an outright denial of the suspected conduct, there could be little doubt that in their minds "truthful" was a characterization of a version of events that consisted of an admission to criminal conduct.

in lengthy colloquy about religion. While this is an exception to the matters preserved by objection, this Court has recently held that the same is plain error.

2. The Court erred in failing to suppress the confession of the Appellant which had been made under such circumstances as the Defendant would have clearly and reasonably fomented hope that should she give such statement that no criminal action would be brought, the same thereby being rendered involuntary.
3. The Court erred by failing to set aside the verdict in this case based upon the Prosecuting Attorney's impermissible references during closing argument to the Appellant's decision not to testify on her own behalf at trial.
4. The Court erred in not finding that the intercepted telephone communication between J.G. and third parties, being unlawfully obtained and thereafter used by the State of West Virginia, was either used as the information for the basis of initiating the investigation or as a means of substantiating same, placing a fatal taint upon the case so as to render the subsequent prosecution improper.
5. Finally, in reaching its decision in sentencing, the Court erred in holding that "(1) there is substantial risk that the Defendant will commit another crime during any period of probation or conditional discharge;" the forgoing being contrary to all evidence in the case and the report of the Court's own psychological expert, as well as those of the Appellant.

POINTS AND AUTHORITIES

It Was Plain and Reversible Error to Permit the Prosecutor to Make Lengthy Argument Based on Religion and the Bible in Connection with the Jury Deliberation During Closing Argument.

Cases

State v. Bolen, ___ S.E.2d ___ (W.Va. 2006), Docket No. 32887 7

State v. Miller, 459 S.E.2d 114 (W.Va. 1995) 7

Griffith v. Kentucky, 479 U.S. 314, 328 (1987) 8

The Court Erred in Failing to Suppress the Confession of the Petitioner Which Had Been Made Under Such Circumstances as to Clearly and Reasonably Foment Hope That Should She Give Such Statement No Criminal Action Would Be Brought Against Her.

Cases

State ex rel. Justice V. Allen, 432 S.E.2d 199 (W.Va. 1993) 9

State v. Parsons, 152 S.E.2d 745 (W.Va. 1930) 9

State v. Persinger, 286 S.E.2d 261 (W.Va. 1982) 9

It Was Error to Permit the Prosecuting Attorney to Make References to the Petitioner's Election to Remain Silent and Not Testify at Trial.

Cases

State v. Mills, 566 S.E.2d 891 (W.Va. 2002) 10

State v. Swafford, 524 S.E.2d 906 (W.Va. 1999) 10

State v. Clark, 292 S.E.2d 643 (W.Va. 1982) 10

State v. Bennett, 304 S.E.2d 35, 38 (W.Va. 1983) 10

State v. Green, 260 S.E.2d 257, 265 (W.Va. 1979) 10

State v. Sprague, 590 S.E.2d 664 (W.Va. 2003) 10

The State of West Virginia Utilized Unlawfully Obtained Evidence In The Form Of Illegal Wire Taps In The Investigation Of Its Case.

Codes and Rules

West Virginia Code § 62-1-D-3 11,12
Title 18 §§ 2510 and 2511 of the United States Code 11

Cases

State v. Williams, 599 S.E.2d 624 (W.Va. 2004) 12
West Virginia DHHR v. David L., et. al., 453 S.E.2d 646 (W.Va. 1994) 12

The Court Erred in Finding That There Is Substantial Risk That the Defendant Will Commit Another Crime During Any Period of Probation or Conditional Discharge.

Codes and Rules

West Virginia Code § 62-12-3 13

LEGAL DISCUSSION

It Was Plain and Reversible Error to Permit the Prosecutor to Make Lengthy Argument Based on Religion and the Bible in Connection with the Jury Deliberation During Closing Argument.

During the rebuttal segment of his closing argument the Prosecutor said the following.

My father was a preacher. I grew up in church all my life. And I've always been a student of the Old Testament. I love the Old Testament because it's so full of history and I love history. And if you look at the Old Testament, the nation of Israel had two views of God, or two views of God's seat or his throne. The one view of one throne that they saw God as sitting on was the Throne of Judgment. And when God sat on the Throne of Judgment, he judged the actions of the people. And when he was sitting on that throne he determined whether the nation or the people had sinned and he dealt with that and he judged them accordingly. That's your job. To judge the action of the Defendant and decide accordingly whether she's guilty or not guilty.

Now there was another throne that God sat upon in the eyes of the nation of Israel and that was the Mercy Throne. Or the Throne of Mercy. And when God sat on the Throne of Mercy, he decided whether or not regardless of whether the Defendant is guilty or not, or regardless of whether the nation is guilty or not, whether they're entitled to mercy. And whether they're entitled to be given a break or cut a break. That's the Judge's job. The Judge sits on the Throne of Mercy. It's his job, not yours to determine what are the consequences of her actions. Not you. (Transcript page 548).

The Prosecutor went on to say,

Let's talk...there's been a lot of talk about church and God in this and you know, all of these people went to church and there's been a lot said about...about that. Let's all consider that, you know, you might want to tend to forgive the Defendant for what she did. And I'm a firm believer that God forgives us for our actions. And that God will forgive her. But just because God forgives us doesn't mean there's no consequences for our actions.

And once again the Bible is replete with examples of that. Moses, the great servant of God, disobeyed God. God forgave him but he still had to deal with the consequences of his actions. He still was not able to enter into the Promised Land.

King David, a person that the Bible says was a man after God's own

heart had probably the deepest relationship with God of any person in the Old Testament. Wrote all these songs about his closeness with God. He sinned. Caused the death of a man by sleeping with that man's wife. And having that man killed so he could be with that man's wife. When the prophet came to him and said God knows what you did, David fell on his face and asked forgiveness. The prophet Nathan said God forgives you but there's still consequences for your actions. Because of your actions the baby that you born, that Bathsheba bares with you will die. Just because God forgives us, there's still consequences for our actions. (Transcript page 549-550).

In State v. Bolen, ___ S.E.2d ___ (W.Va. 2006), Docket No. 32887, the Court found that the opening statements of the Prosecuting Attorney that made repeated emphasis on "religious convictions, devotion to his church and to God" and to spiritual commitment and missionary activities and getting "right with Christ" coupled with references to faithful church attendance and speaking to the jury in terms of "going to go to Hell and carrying his cross every day" were grounds for reversal. The Court further found that to permit the same did not require objection as the same was plain error. In the case *sub judice*, the Prosecutor clearly appealed to a presumably predominantly Christian southern West Virginia jury to be guided in its deliberations by axioms of religion. This violates both the Prosecutor's duty in a quasi-judicial role and constitutes plain error all as articulated in Bolen, *supra*.

While not preserved by objection at the trial below, the Appellant is nonetheless entitled to reversal on this ground as plain error. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects the substantial rights; and (4) seriously affects the fairness, integrity or public reputation of the judicial proceedings". Syl. Pt. 2, Bolen citing State v. Miller, 459 S.E.2d 114 (W.Va. 1995).

Additionally, the holdings of Bolen are available to the Appellant and in the present case

must be applied retroactively. “We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

The Court Erred in Failing to Suppress the Confession of the Appellant Which Had Been Made Under Such Circumstances as to Clearly and Reasonably Foment Hope That Should She Give Such Statement No Criminal Action Would Be Brought Against Her.

It is undisputed that the Appellant was in an exceedingly desperate situation in her personal life, being severely abused at the hands of her husband, including being beaten and subjected to gun fire by the husband on the property, ultimately resulting in the husband being committed to a mental facility. The Appellant was in an extremely frail emotional state when the instant investigation led to her being approached by the police. Pastor Scott Hodge, a brother of the Appellant, testified at length that he trusted a close friend and member of the West Virginia State Police, Trooper Chuck Maynard, and consulted him regarding the case. (See testimony of Pastor Scott Hodge at 431-438). Trooper Maynard reported that he had conferred with Trooper Alan Christian who said, in substance, that if the Appellant would come down and give a truthful² statement that the whole matter could be put behind them. In his sworn testimony, Trooper Maynard concedes that that occurred. “And then would it be also true that based on your communication with Scott Hodge that it wouldn’t be hard for him to understand the meaning of

²As noted *ante*, the police officers involved apparently disbelieved the first statement of the alleged victim, J.G., and the “truthful” statement being pursued was one that would inculpate the Appellant. Following the substantial admissions to criminal conduct by the Appellant, a second statement was taken from J.G., this time alleging wrongful conduct by the Appellant.

that? That when you put something behind you, you put it to rest and it's over for all times. Is that right? Answer: I would assume so, yes, sir." (See testimony of Trooper Chuck Maynard at page 457).

"When the representations of one in authority are calculated to foment hope or despair in the mind of the accused to any material degree, and a confession ensues, it cannot be deemed voluntary." State ex rel. Justice V. Allen, 432 S.E.2d 199 (W.Va. 1993), citing State v. Parsons, 152 S.E.2d 745 (W.Va. 1930), and State v. Persinger, 286 S.E.2d 261 (W.Va. 1982). The Appellant readily concedes that recent authority requires an analysis of the *totality of circumstances* where confessions are taken. The uncontested testimony of Scott Hodge, *supra*, clearly indicates the Appellant was visibly frail, gaunt and in a poor mental condition that manifested in her physical appearance and affect. It is clear, even under the totality of circumstances criteria, that even a robust resistant suspect would find it hard to resist an opportunity to satisfy the offer to placate the police authority and walk away from the extreme unpleasantness of the situation, much less a frail person such as was the Appellant during that time. (See also testimony of counselor, Sylvia Wright, pages 443-453 and Dr. Steve Dryer, pages 463-481). Accordingly, the statement of confession given by the Appellant should have been summarily excluded from the evidence at trial.

It Was Error to Permit the Prosecuting Attorney to Make References to the Appellant's Election to Remain Silent and Not Testify at Trial.

The State's only substantive evidence at trial was the testimony of the State's victim, J.G., which as noted in the record consumed a total of twenty-two minutes, and the reading of the

Appellant's statement of confession to the jury. During closing argument, the Prosecuting Attorney, while gesturing to the Appellant, stated the following.

And you heard her tell the same thing to the State Police. The exact same thing. Well, let's talk about that for a little bit. They would want you to believe that you can't trust this statement she gave to the State Police. **You never heard anybody come in here and say this was a false statement.** Mr. McMillian: Your Honor I need to object and need to approach. The Court: The objection's overruled. Mr. Sadler: **No one came in here and said that she lied to the State Police. No one ever said the State Police wrote down wrong what she said.**" (Transcript at page 513; emphasis added).

This could only be taken as a reference to the Appellant's failure to testify at trial and deny the statement or that the police "wrote down wrong what she said". "The general rule formulated for ascertaining whether a Prosecutor's comment is an impermissible reference, direct or oblique, to the silence of the accused is whether the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a reminder that the defendant did not testify." State v. Mills, 566 S.E.2d 891 (W.Va. 2002), citing State v. Swafford, 524 S.E.2d 906 (W.Va. 1999), quoting State v. Clark, 292 S.E.2d 643 (W.Va. 1982). The Mills case also cites to State v. Bennett, 304 S.E.2d 35, 38 (W.Va. 1983), finding prejudicial a prosecutor's repeated statements that the State's evidence was uncontradicted or had not been denied, a strikingly similar scenario to the case *sub judice*. Mills also refers to State v. Green, 260 S.E.2d 257, 265 (W.Va. 1979), reversing due to a prosecutor's statements "none of the facts are in dispute. No one said those things didn't take place...there is no one in this courtroom that ever said he didn't do it." See also State v. Sprague, 590 S.E.2d 664 (W.Va. 2003), where the Court reversed due to the Prosecutor's comments to the effect that "The Defendant, as you have noted, as you've seen from this trial, has not contradicted any of the State's evidence or any of the State's testimony basically

about the events that occurred....” See also State v. Swafford, 524 S.E.2d 906 (W.Va. 1999), finding reversible error because of the Prosecutor’s remarks, by inference, suggesting an inference of guilt due to the fact that the Co-Defendant testified, thus implying that the Defendant did not.

Accordingly, with particular emphasis on the singular importance of the confession relatively speaking, the impermissible reference to the Appellant remaining silent at trial is clearly reversible error.

The State of West Virginia Utilized Unlawfully Obtained Evidence In The Form Of Illegal Wire Taps In The Investigation Of Its Case.

As noted *ante*, Deborah H., the mother of the State’s alleged victim, J.G., unlawfully intercepted certain calls to which J.G. was a party without his consent or the consent of the parties to whom he was speaking. During pre-trial hearings concerning that matter, Deborah H., with the advice of her counsel whom was present, declined to answer any questions concerning the same by invoking her right against self-incrimination. (See Transcript testimony of Deborah H. page 170-172). Deborah H.’s church pastor, Charles G. Shrewsbury, confirmed that Deborah H. had confided in him about the recording of such telephone calls. (See Transcript page 179-180). Notes regarding what purports to be conversations between the Appellant and J.G. were included with the State Police report given to counsel in discovery. It is clear that the telephone recordings were made in controvention to West Virginia Code § 62-1-D-3 and Title 18 §§ 2510 and 2511 of the United States Code, which make it unlawful both to intercept and to *use* the information derived therefrom. While no evidence exists that the State was complicit in the making of the illegal recordings, some use was apparently made of the same in that it was part of the Prosecuting Attorney’s file and turned over to the Defendant in discovery.

In State v. Williams, 599 S.E.2d 624 (W.Va. 2004), the Court held that the fact that the non-consenting party is a minor is of no moment to the analysis “the statute simply contains no vicarious consent exception for minors, and we refuse to find that one exists without a statutory basis to do so.” Williams further holds that “West Virginia Code § 62-1D-3 clearly states that consent is required of one “person [who] is a party to the communication”. The same is also impermissible irrespective of the suspected potential harm to children, see West Virginia DHHR v. David L., et. al., 453 S.E.2d 646 (W.Va. 1994). Unlawfully obtained evidence is clearly suppressible but more important to the facts of the case *sub judice*, the derivative evidence must likewise be suppressed, including the evidence collected thereafter and particularly the confession of the Defendant.

The Court Erred in Finding That There Is Substantial Risk That the Defendant Will Commit Another Crime During Any Period of Probation or Conditional Discharge.

The Final Order appealed from in the case at bar states the following. “ The Court finds that the Defendant is not a fit and proper person for probation because: (1) there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge....” The record in this case demonstrates that the Defendant has absolutely no criminal history whatsoever. The record further discloses that her former conduct was that of a community member who was active in the church and often devoted her time to assisting with the music at funeral services of congregation members and others. During the period in which her conduct is alleged to have occurred, she was suffering extreme emotional distress largely owing to the extreme abuse suffered at the hand of her estranged husband. Each of her psychological experts that examined her, including the Court’s own expert, William Steinhoff, Psychologist,

clearly indicated a complete absence of likelihood that the Appellant would re-offend. (See report of William Steinhoff, Psychologist). The effect of the referenced finding disqualifies the Appellant for a suspension of sentence and release on probation as contemplated by West Virginia Code § 62-12-3, which provides in pertinent part that a convicted person is eligible for same "...it shall appear to the satisfaction of the Court that the character of the offender and the circumstances of the case indicate that he is not likely again to commit crime..." Accordingly, the Appellant's rights are irreparably prejudiced by the referenced finding.

PRAYER

The Appellant respectfully prays that this Court vacate the convictions in the case below, and order the same to be stricken from the docket of the Circuit Court of Mercer County or in the alternative order that the matter be remanded for re-trial consistent with the findings of this Court, along with all other relief this Court may deem proper under law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark McMillian, undersigned counsel for the Appellant, certify that a true and exact copy of the accompanying *Brief of Appellant* was served upon the State of West Virginia by regular U.S. Mail postage paid to its Prosecuting Attorney of Mercer County, Tim Boggess, Esq., 120 Scott Street, Suite 200, Princeton, West Virginia, 24740, and to Dawn E Warfield, Esq., West Virginia Attorney General's Office, 1900 Kanawha Boulevard, E., Rm E-26, Charleston, WV 25305-0220 on this the 1st day of June, 2007.



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