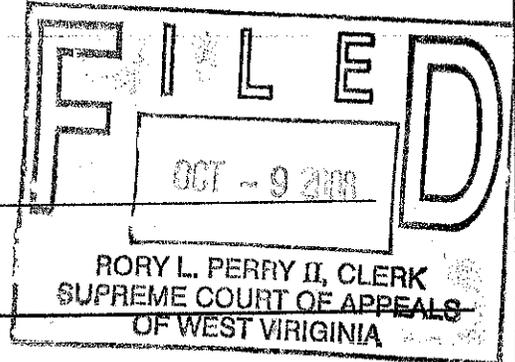


NO. 33835

IN THE SUPREME COURT OF APPEALS

OF
WEST VIRGINIA

CHARLESTON



State of West Virginia, Plaintiff Below,
Appellee

VS.

Circuit Court of Raleigh County
Honorable John A. Hutchison
Case No. 06-F-70-H

Gloria Jean Willett, Defendant Below,
Appellant

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

I.
OMISSIONS OR INACCURACIES OF
THE APPELLANT'S STATEMENT OF THE CASE

On May 13, 2005 members of the Beckley City Police Department executed a search warrant issued by the Circuit Court of Raleigh County, West Virginia at property owned and controlled by Gloria Jean Willet, hereinafter, "Defendant". The property was located at 201 Quarry Street, Beckley, Raleigh County, West Virginia (TR-28). The search resulted in police officers seizing in excess of three thousand (3000) pharmaceuticals including Oxycontin, Percocet, Roxycodone and Zanax (TR-29).

Events leading to seeking of the search warrant began in early 2004 when the Beckley Police Department received a tip indicating the defendant had been engaged in drug trafficking (TR-22). The tip was from Alan Reed, hereinafter, "Reed." At the time Reed was an inmate in the Southern Regional Jail. In August 2004 officers received additional information from an individual involved in an unrelated investigation that a white female was coming from the Tampa, Florida area to a house at 201 Quarry Street with large amounts of Oxycontin to sell. The vehicle was described as black SUV with out of state tags (TR-25).

Subsequently the case agent Det. M. G. Montgomery received another phone call from an anonymous source who was a neighbor of the Quarry Street residence. The caller went into detail about observed traffic coming to the house. (TR-25). This call triggered the beginning of police involvement. Det. Montgomery went to the house and saw a black Expedition with Florida tags. Thereafter, Det. Montgomery went to the residence near the first of each month. He watched vehicles coming for a short period of time and leaving. (TR-28).

On May 12, 2005 another complaint came to Beckley Police. That complaint went into detail and for the first time named Defendant (TR-26-27). Det. Montgomery based upon the investigation to that point sought and received a search warrant executed the following day (TR-28).

Defendant acquired the controlled substances through prescriptions from two different physicians. Dr. Rew of Tampa, Florida was Defendant's primary physician. Dr. Rew issued prescriptions for Oxycontin, Percocet, Zanax and Hydrocodone. Dr. McClung of Lewisburg, West Virginia was the other physician to provide defendant with prescriptions for narcotics (TR-32). Neither physician was aware that Defendant was acquiring the prescriptions from the other physician (TR-309-310). Defendant was clearly engaged in doctor shopping. The state did not indict Defendant for her violation of West Virginia Code §60A-4-410 which prohibits doctor shopping.

Allen Reed, hereinafter, "Reed" has been described in Defendant's petition and brief as the State's "star witness." Prior to Reed's testimony the Court read the cautionary instruction to the jury indicating that the evidence was to be considered only so far as in the jury's opinion it may go to show intent, the motive the preparation or the plan of Defendant to possess with intent to deliver (TR-120). Reed was introduced to Defendant as a supplier of narcotics through Defendant's brother Gary Lilly, hereinafter, "Lilly" (TR-125).

Defendant sold Reed Oxycontin, Percocet and Lortabs to on multiple occasions during acquaintanceship between Defendant and Reed (TR-125-126). In addition to Reed purchasing narcotics directly from Defendant, Reed brought other customers to Defendant who made purchases from Defendant and in so doing Reed received pills for his own use as a commission (TR-127). Reed is an admitted addict and therefore personally consumed some of the pills he

purchased from Defendant. Reed also admits that he sold some of the pills in support of his addiction (TR-126). Although Reed purchased the pills on a number of occasions, he cannot specify a date of any one sale (TR-138).

Neither the state nor the Defendant called Lilly as a witness at trial. The state cannot account for Defendant. The state diligently searched for Lilly, but could not locate him. Lilly had provided the case agent with a statement confirming Reed's version of how Reed and Defendant had met as well as Defendant's trafficking in narcotics.

II. AUTHORITIES RELIED UPON

Decisions of the Supreme Court of Appeals of West Virginia

State v. Hanna, 378 S.E.2d 640, (W.Va. 1989)

State v. McGinnis, 455 S.E.2d 516 (W.Va. 1994)

State v. Nelson, 434 S.E.2d 697 (W. Va. 1993)

State v. Smith, 438 S.E.2d 554 (W.Va.1993)

State v. Taylor, 593 S.E.2d 645 (W.Va. 2004)

State *ex rel.* Caton v. Sanders, 601 S.E.2d 75 (W.Va. 2004)

West Virginia Code

§60A-4-401(a)

§60A-4-410

West Virginia Rules of Evidence

Rule 402

Rule 403

Rule 404(b)

III.
ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF OTHER
CRIMES FOR LIMITED PROPER PURPOSES

The evidence of other crimes was properly admitted. The state notified Defendant of its intention to introduce evidence of other bad acts February 17, 2006. On July 31, 2006 the Circuit Court conducted a hearing pursuant to *State v. McGinnis*, 455 S.E.2d 516 (W.Va. 1994).

At the July 31, 2006 hearing the Honorable John A. Hutchison heard the evidence of the state concerning the distribution of controlled substances by Defendant at an *in camera* hearing required by *State v. McGinnis*, 455 S.E.2d 516 (W.Va. 1994). The state called Reed who testified and was subjected to cross examination. The defense called Defendant who testified at that hearing as well as Defendant's spouse. Judge Hutchison weighed the evidence and after initially taking the matter under advisement determined that the state had made the requisite showing that by a preponderance of the evidence the defendant had delivered controlled substances to Reed, that the evidence was relevant W.V.R.E. 402 and that the probative value of the evidence outweighed its prejudicial effect W.V.R.E.403. *State v. Smith*, 438 S.E.2d 554 (W.Va. 1993). Judge Hutchison subsequently issued a ruling at the final pre-trial hearing.

The testimony of Defendant's delivery of narcotics to Reed was not emphasized to the extent that a jury convicted Defendant because of the evidence of other crimes. *State v. Hanna*, 378 S.E.2d 640 (W.Va. 1989). Reed's direct testimony covers 9 pages of trial transcript out of 384 pages. Reed's re-direct took 4 pages. The evidence was very limited in nature and duration.

At trial, Reed testified substantially as he had testified at the *McGinnis* hearing, although in a much more limited manner. Prior to Reed's testimony, the trial court read a proper limiting instruction to the jury confining its consideration of Reed's testimony to the purposes of proving motive, planning and intent. *State v. Taylor*, 593 S.E.2d 645 (W.Va. 2004) (TR-120). The same instruction was read to the jury as part of the Court's charge at the conclusion of the evidence.

Defendant contends that Reed was the "State's star witness." Defendant's Petition p. 4 and again in her brief. That is not accurate. Four of the five felony charges against Defendant were Possession of a Controlled Substance with Intent to Deliver in violation of West Virginia Code §60A 4-401(a). The state had the burden of proving Defendant's state of mind with respect to the huge stash of drugs in Defendant's possession. The fact that Defendant was actively engaged in doctor shopping, which was not presented as a crime, but as a circumstantial fact, the amount of controlled substances in Defendant's possession at the time of execution of the search warrant (over 3000 pills), the location of some of the pills under a mattress (TR-174) and Defendant's totally incredible testimony indicate that if there was a star witness for the state it was Defendant herself.

The state made very sparing use of Reed's testimony, which encompasses a total of 13 pages of direct and redirect testimony out of 384 total pages. The testimony went primarily to the element of intent, which the state was required to prove. *State el rel. Canton v. Sanders*, 601 S.E.2d 75 (W.Va. 2004).

While Defendant's reasoning on alleged improper introduction of the 404(b) evidence is not totally clear, it appears that Defendant's focus in her brief goes more to the credibility of Reed than to Judge Hutchison's decision to permit Reed to testify. Judge Hutchison engaged

in a proper screening of the evidence at the July 31, 2006 *McGinnis* hearing. Implicitly Judge Hutchison found Reed a sufficiently credible witness to permit Reed to testify in front of the jury. Likewise, 12 citizens of Raleigh County found the state's evidence including that offered by Reed to be credible.

Much of Defendant's brief discusses the alleged lack of police investigative procedures that tend to provide support to evidence. As Defendant's brief does not include page numbers and the lettering does not seem to follow a particular pattern it is somewhat challenging to address the specifics contained therein. Defendant asserts in the second subsection B that the Character of the Speaker as allegedly established at the July 31, 2006 *McGinnis* hearing should lead this Honorable Court to reverse the trial court. The defendant was permitted to explore Reed's character at trial (TR-144-149). The jury heard the attacks on Reed's character but nonetheless found Reed's testimony to be credible.

In the second subsection C defendant apparently asserts that the trial erred because the state did not provide some type of corroboration of Reed's testimony. Noticeably absent from Defendant's brief is legal support for such a proposition. The explanation for that absence is no such authority exists.

After removing the state, the state's representatives and the press from the courtroom the Court and the Defendant conferred with Defendant's counsel as to Defendant's option of testifying in her own behalf. She elected to testify. The defense elected to present Defendant as the elderly aunt type who would was not a drug dealer (TR-19). The jury properly elected not to accept that portrait. Defendant at the time of the trial was 56 years old (TR-271) but appeared older than her stated years.

Defendant testified that she and her spouse were of limited means (TR-313-314). For reasons that were never clear Defendant defied the normal course of events and was intending to retire from the trading card business and relocate from Florida to Beckley. Defendant had undergone back surgery (TR-307). Her spouse was in very poor health, yet they made repeated trips from Florida to Beckley, to "work on the house" involving travel of 1,600 miles (TR-311-312). The house on Quarry Street in Beckley where the search was executed was purchased on a credit card (TR-315). Defendant although in possession of a credit card refused to use it and claimed the need for possessing cash for travel and home improvement expenses (TR-315). Defendant and her spouse drove the 780 miles straight through, some times slept in their car, but rarely rented a motel room so as not to incur a credit card charge for a motel (TR-311). Defendant could not explain why she brought thousands of pills of Oxycodone and hydrocodone along with tranquilizers from Florida to Beckley only to drive an additional hour from Beckley to Lewisburg, WV and an hour back to Beckley to acquire more of the same drugs (TR-323-324). The jury clearly did not believe Defendant's bizarre explanation for the frequent trips to Beckley. This was at a time when defendant's primary means of generating income was from a sports card business maintained in Florida by Defendant's husband. The jury did not believe defendant's explanation for her maintaining two prescribing physicians while keeping both in the dark about the other's treatment. In short the jury did not believe any of Defendant's testimony primarily because it was plainly not believable.

Given the minor role of the evidence admitted pursuant to W.V.R.E. 404(b) in this case and the inclusive nature of the rule, this Honorable Court should not reverse the jury's verdict on such a basis. *State v. Nelson*, 434 S.E.2d 697 (W.Va. 1993).

IV.
CONCLUSION

For the above stated reasons, the State of West Virginia prays that this Honorable Court
AFFIRM Defendant's conviction.

State of West Virginia
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Appellant

CERTIFICATE OF SERVICE

I, Tom Truman, APA, do hereby certify that I have served this date the Brief of Appellee State of West Virginia by mailing a copy United States Mail, First Class Postage Pre-paid to:

PAUL S DETCH ESQ
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this date.

Dated: October 8, 2008



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