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NO. 34266

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

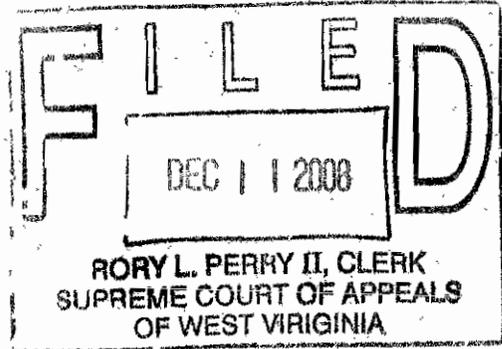
STATE OF WEST VIRGINIA,

Appellee,

v.

DANNY MINIGH,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by Danny Minigh (hereinafter "Appellant") from the August 17, 2007, order of the Circuit Court of Calhoun County (Evans, J.), which denied his motion for a new trial and sentenced him to a term of one year to five years in the state penitentiary upon his conviction by a jury of one count of conspiracy to commit a felony offense in violation of West Virginia Code § 61-10-31. Specifically, Appellant was convicted for conspiracy to manufacture a Schedule IV controlled substance in violation of West Virginia Code § 60A-4-401. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

II.

STATEMENT OF FACTS

Some time in the evening and early morning of July 22 and 23, 2004, Trooper Mark Yost of the West Virginia State Police pulled over a vehicle traveling on Route 5 from Interstate 79 heading toward Glenville in Braxton County. The reason for the traffic stop was that the Trooper observed that the vehicle had a headlight that was out. (Tr., 78-79, April 3, 2007.) There were three people in this car; Appellant was driving, George Dusky was in the front passenger seat and James "Bub" Jones was sitting in the back seat. (*Id.* at 80.) The trooper noticed that Appellant seemed very nervous upon being pulled over. (*Id.* at 78.) Trooper Yost gave Appellant a warning. The trooper then discovered that Appellant did not have a driver's license in his possession. (*Id.* at 81.) When Trooper Yost asked Appellant for his name, the latter gave a fictitious one. (*Id.*)

At this point, Trooper Yost asked if he could search the vehicle. Appellant granted this request but stated that it actually belonged to Mr. Dusky. (*Id.* at 78.) Trooper Yost then obtained consent from Mr. Dusky to search the car. (*Id.*) The state trooper radioed for backup and proceeded to search the vehicle. (*Id.* at 82.) Upon initial observation, Trooper Yost found an envelope which had a shopping list containing ingredients for methamphetamine written on the back of it. This list included such items as hose, matches and lye. (*Id.* at 82.) Trooper Yost then looked further in the vehicle and found a bag behind the driver's seat that contained HEET gas antifreeze, a Coleman heater and a baggie consisting of several round pills. (*Id.* at 82-83.) The pills were in the baggie and removed from individual "blister packs." (*Id.* at 83.) From his list of what he had found, Trooper Yost testified that he also discovered one gallon of acetone, four 12-ounce bottles of HEET gas line antifreeze and one bottle of Red Devil lye. (*Id.* at 84.)

Trooper Yost testified that he found numerous receipts in the car. (*Id.* at 85.) Specifically, the trooper found a Family Dollar receipt for two rolls of paper towels and nasal decongestant, a receipt from Advance Auto Parts for four bottles of line antifreeze and a receipt from a tractor supply company for a bottle of acetone. All of these receipts had the same date on them. (*Id.* at 98.) Trooper Yost testified that all of these products are considered methamphetamine precursor. (*Id.* at 87, 90.)

When the state trooper removed the items mentioned above out of the vehicle, Appellant made a spontaneous statement, "That is mine." (*Id.* at 91, 101.) Right after that, Trooper Yost gave all three men a *Miranda* warning. (*Id.*)

At this time, Mr. Jones executed a consent form to search his residence in Calhoun County because there were other methamphetamine items there. (*Id.* at 93-95.) All three of these men were arrested at this point. (*Id.* at 98.)

West Virginia State Trooper J.B. Hunt, stationed in Calhoun County, received the Jones consent form and other material from the Braxton County officers and obtained a search warrant for Mr. Jones' house. Trooper Hunt, accompanied by Sergeant Bonazzo, Trooper Huddleston and Trooper Yost from Braxton County, as well as First Lieutenant Michael Goff with the West Virginia State Police stationed in Charleston conducted a search. (*Id.* at 104.) Upon entering the house, the officers found a scale, a gym bag with Appellant's personal belongings and a pharmaceutical and nursing book. (*Id.* at 105-06.) Trooper Hunt testified that, in addition to some of Appellant's personal items, there were spoons with white powder on them and stained coffee filters contained in the gym bag. (*Id.* at 108.) He also testified that there were syringes found in the gym bag. (*Id.* at 139.)

The state police officers then went into the basement crawlspace area and observed plastic containers and tubing, which Trooper Hunt testified were precursor to produce methamphetamine. (*Id.* at 116.) Totes were found in this area that contained various material. Trooper Hunt identified through photographs various items found in these totes: tubing that was stained brown, jars with tubing coming out of them, raw containers, a glass jar with a yellow substance in it, a collection vial, a plastic jug with liquid in it and a bottle. (*Id.* at 119-26.) The trooper testified that all of these materials in the pictures were methamphetamine precursor. (*Id.* at 126.) Trooper Hunt also identified a picture of a chemistry beaker with a brown substance in it. (*Id.* at 128.)

There was a separate search warrant obtained to enter an outbuilding. Trooper Hunt testified that they found metal tubing, brass tubing and match sticks soaking in solvent. (*Id.* at 133.) They also found stained coffee filters and a Coke bottle with a substance in it. (*Id.*)

First Lieutenant Michael Goff, who was involved in the investigation of Mr. Jones' Calhoun County residence, testified. It was established that he was the State's lead expert in methamphetamine. (*Id.* at 143-44.) During his testimony, the lieutenant went through all the material that was found at the residence and explained how each was used in the production of methamphetamine. (*Id.* at 158-70.) In his opinion, these items were being used to manufacture methamphetamine, and they constituted a methamphetamine lab located under his house. (*Id.* at 170, 173.)

Corporal D. P. Starcher testified that he obtained a second search warrant of the outbuilding and conducted another search where additional materials were found. In this search, he found a jug of muriatic acid and additional coffee filters with a residue on them that appeared to be iodine or some other chemical. (*Id.* at 132.) He also observed copper tubing and a jug that had striker plates

from matches soaking in a solvent in it. (*Id.*) He found additional coffee filters and stained gloves. Corporal Starcher testified that he smelled iodine and other materials used in the manufacture of methamphetamine. (*Id.* at 184.) Based on his training and experience, he concluded that the materials he found were used in the production of the drug. (*Id.* at 183.)

Mr. Jones testified that Appellant was living at his house at the time and put the materials in question under it without his knowledge. (*Id.* at 191.) Mr. Jones testified that there was a funny smell coming from his house when Appellant was living there. (*Id.* at 194, 203.) Mr. Jones did state that he owned the copper tubing found in the outbuilding and some canning jars, which he said were moved from the sink area where he had put them. (*Id.* at 200, 203.)

At the trial, Mr. Jones did admit to buying some of the pills on the day they were pulled over in Braxton County. (*Id.* at 197.) It was brought out in this trial that Mr. Jones had entered a plea agreement and pled guilty to conspiracy. Yet this admission was only for the limited purpose of determining the credibility of this witness, and the circuit judge so instructed the jury on the evidence. (*Id.* at 192-93.) As stated previously, the jury found Appellant guilty of conspiracy to commit the felony offense of manufacturing a controlled substance. (Tr., 273, April 4, 2007.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's responses:

- A. THE COURT ERRED BY NOT GRANTING THE DEFENDANT'S MOTION TO DISMISS BASED UPON DOUBLE JEOPARDY WHEN A BRAXTON COUNTY CIRCUIT JUDGE SWORE A JURY, TOOK EVIDENCE AND GRANTED THE DEFENDANT'S MOTION TO DISMISS STATING THAT THE BRAXTON COUNTY CHARGES ARE IN DOUBLE JEOPARDY WITH THE CALHOUN COUNTY CHARGES DUE TO THE CHARGES BEING SIMILAR IN NATURE.

State's Response:

While it is true that the charges stemming from the traffic stop in Braxton County were dismissed, the offenses for which Appellant was standing trial in this case were distinct transactions that took place in another jurisdiction. Thus, there was no double jeopardy violation.

- B. THE COURT ERRED BY ALLOWING THE STATE TO USE EVIDENCE IN THE CALHOUN COUNTY TRIAL FROM THE BRAXTON COUNTY STOP RULING THAT THIS EVIDENCE IS INTRINSIC TO THE CHARGES.

State's Response:

There was no error in the circuit court's admission of the evidence of the Braxton County traffic stop and search. This was a proper use of West Virginia Rule of Evidence 404(b).

- C. THE COURT ERRED BY NOT GRANTING THE DEFENDANT'S POST-TRIAL MOTION FOR JUDGMENT FOR ACQUITTAL WHEN THE STATE PRODUCED NO EVIDENCE OF A CONSPIRACY OCCURRING WITHIN THE JURISDICTION OF CALHOUN COUNTY.

State's Response:

The circumstantial evidence presented regarding Mr. Jones as well as the evidence against Appellant were sufficient to convict him of conspiracy, despite Mr. Jones' denial that he was involved in the production of methamphetamine.

IV.

ARGUMENT

A. APPELLANT'S CONVICTION DID NOT AMOUNT TO A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE. THE OFFENSES FOR WHICH HE WAS ON TRIAL IN CALHOUN COUNTY AROSE FROM A DISTINCT TRANSACTION FROM THOSE IN THE OTHER JURISDICTION OF BRAXTON COUNTY.

Appellant's conviction in this case does not violate the prohibition against double jeopardy.

The offenses for which Appellant was charged in Braxton County and Calhoun County came from distinct and separate transactions that occurred in different jurisdictions. In fact, the circuit judge's limiting instruction that Appellant was on trial for offenses that occurred in Calhoun County and not those that occurred in Braxton County shows that the crimes in these two separate jurisdictions arose from distinct transactions. Therefore, there is no double jeopardy issue here.

1. The Standard of Review.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Syl. Pt. 1, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992).

2. While It Is True That the Charges Stemming from the Traffic Stop in Braxton County Were Dismissed, the Offenses for Which Appellant Was Standing Trial in this Case Were Distinct Transactions Arising from Another Jurisdiction. Thus, There Was No Double Jeopardy Violation.

There was no double jeopardy violation in this case, despite the dismissal of the charges stemming from the Braxton County traffic stop. As established in *Gill, supra*, the double jeopardy clause protects against a second prosecution for the *same offense* after an acquittal, a second

prosecution for the *same offense* after conviction and multiple punishments for the *same offense*. According to Appellant, the circuit judge in Braxton County dismissed the charges against him upon renewal of a motion for the same once a jury was sworn and the prosecutor was allowed to call the first witness. (*See* Appellant Brief at 13.) According to Appellant, the basis for the dismissal was that the offenses that occurred in Braxton County and those in Calhoun County were from one transaction, and he would be in jeopardy with the latter charges. Appellant cites no court transcripts or records as to this being the reasoning for the dismissal, and in footnote 1 of his brief, he admits that this information did not come from an official court transcript or court order. (*See id.*) Upon research of the record, there was a court order from the circuit court in Braxton County that dismissed the charges against Appellant arising from the stop. However, the circuit judge gave no legal reasoning or ruling in granting Appellant's motion to dismiss. (R. at 314-15.) Basically, all the order states is that Appellant made said motion with no objection from the prosecution, and it was granted. No grounds for such granting of the motion were given. With regard to this, the circuit judge in Calhoun County stated the following in a suppression hearing:

But Judge Facemire [circuit judge in Braxton County] made no rulings in this case [Braxton County case]. There is no erroneous decision to which collateral estoppel or double jeopardy applied in this case, in my opinion.

(Suppression Hr'g, 200, May 25, 2006; R. at 342.)

Despite the lack of any citation as to the reasoning behind a dismissal in Braxton County, Appellant cannot overcome the fact that the offenses for which he was charged in two separate jurisdictions were two distinct transactions; thus, not separate prosecutions for the same offense as outlined in *Gill, supra*. Regarding the Braxton County offenses, the circuit judge gave the following limiting instruction to the jury, to which the Appellant's counsel agreed:

The jury must remember that the defendant is being tried for operating a meth lab or a clandestine drug lab in Calhoun County, manufacturing methamphetamine in Calhoun County, and entering into a conspiracy in Calhoun County. *This evidence about the traffic stop occurring in Braxton County is something that this man is not on trial for.*

It was admitted into evidence for a limited purpose, and that was to the extent that evidence may—depending on the credit and weight you give to it, if any—may indicate a conduct that is a *necessary preliminary to the crimes that are charged in Calhoun County*—depending on the weight and credit you give to the evidence, if any—may indicate evidence *necessary to complete the story* of the entire transaction.

So that evidence was admitted for a limited purpose, and you must always remember that in your consideration of this case. We're going to be hearing other evidence, at least one other witness, right Counsel?

(Prosecutor): Yes, sir.

— that is going to be testifying about what happened in Braxton County. It is just important to remember that Mr. Minigh *is not on trial for what he may or may not have done in Braxton County, West Virginia, only what occurred in Calhoun County.*

(Tr., 137-38, April 3, 2007; emphasis added.) These instructions make it very clear that these were separate offenses. It is true that the circuit judge used the term “entire transaction” in this limiting instruction, yet that is in the context of telling the whole story such as how the state police found out about the clandestine lab. It is obvious that none of the double jeopardy prohibitions outlined in *Gill, supra*, have occurred here.

This scenario is similar to the Supreme Court of Montana case of *Stilson v. Montana*, 924 P.2d 238 (Mont.1996), where a defendant raised a double jeopardy claim for convictions in two district courts for writing bad checks. The Supreme Court of Montana held that the defendant committed separate and distinct crimes of writing bad checks in each county, and each series of transactions in these counties were different from the others. Thus, there was no double jeopardy

violation in his being convicted in other jurisdictions. (*Id.* at 241, 26.) The State asks this Court to adopt the same ruling as in *Stilson, supra*, for the two distinct transactions in this case.

We are not sure where Appellant and the two other men were going when they were pulled over in Braxton County, but they were caught with methamphetamine precursor there, and later precursor and a clandestine lab were found in Mr. Jones' house in Calhoun County where Appellant was residing at the time. Again, it is unclear as to why Appellant's motion to dismiss was granted in his Braxton County case since he gives no citation via court transcript or judicial order, and the order found within the record gives no legal grounds for it; yet he fails to overcome the fact that he was charged in two different jurisdictions for two distinct transactions. Appellant makes a puzzling argument and asks this Court to set a dangerous precedent whereby a defendant may get a conviction or convictions reversed on double jeopardy grounds where he or she has committed multiple and distinct offenses in different jurisdictions when one case happens to get dismissed in a particular jurisdiction where there is similarity in the charges. Regardless of the reasoning behind the dismissal of his Braxton County case and the commonality or similarity of the offenses in these two separate jurisdictions, Appellant was not in jeopardy of being prosecuted twice for the same offense as outlined in *Gill, supra*.

As alluded to in the quote from the circuit judge in the May 25, 2006 Suppression Hearing stated above, Appellant's defense counsel raised the issue of collateral estoppel as grounds to dismiss the case against him since the matter was allegedly adjudicated in the Braxton County case. Appellant cites the holding of *State v. Porter*, 182 W. Va. 776, 392 S.E.2d 216 (1990). In that case, this Court held the following:

The principle of collateral estoppel applies in a criminal case where an issue of ultimate fact has once been determined by a valid and final judgment. In such case, that issue may not again be litigated between the State and the defendant. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

Id., Syl. Pt. 1. However, that case involved a scenario where the defendant was being tried in a second case where two murder charges that allegedly occurred at the same time by the same perpetrator were bifurcated, and it was being argued that he was found not guilty of committing the murder of one victim in a previous trial because he was found not to be the perpetrator. (*Id.* at 780, 392 S.E.2d at 220.) Contrasting that with the case at bar, it is clear that the charges in Braxton County and in Calhoun County stemmed from two separate transactions, were distinct crimes and occurred in different counties. Therefore, collateral estoppel does not apply here.

It is also interesting to note that in *Porter, supra*, this Court remanded the circuit court case to examine the entire record of the first case against the defendant, with the principle of collateral estoppel as held in the decision, because it was not clear from what was presented that the ultimate issue of fact was indeed determined in the original case. (*Id.*) In remanding the case on this ground, this Court looked to earlier federal cases and held the following regarding collateral estoppel:

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' citing, *Sealfon v. United States*, 332 U.S. 575, 579, 68 S.Ct. 237, 240 (1948).

(*Id.*) In light of this, it is again worth noting that Appellant cites no transcript or record establishing that the ultimate fact was decided that the charges in the two counties were the same in the Braxton County dismissal for collateral estoppel purposes. The circuit court order from the Braxton County case found in the record gives no evidence of this ultimate fact as well.

The circuit court distinguished *Porter* from this case, ruled that it was not offenses arising from the same transaction and denied Appellant's motion. (Suppression Hr'g, 202-04, May 25, 2006; R. at 344-46.)

In light of all of this, Appellant has failed to establish that his double jeopardy rights have been violated or that collateral estoppel applies. Thus, his argument fails on this ground.

B. THE COURT DID NOT ERR BY ADMITTING EVIDENCE OF THE BRAXTON COUNTY CHARGES. DESPITE APPELLANT'S CLAIMS, THE EVIDENCE WAS INTRINSIC TO THOSE OF THE INSTANT CASE, AND IT WAS A PROPER APPLICATION OF RULE 404(B).

Appellant wrongly asserts that the circuit court erred by admitting evidence relating to the Braxton County stop because it was extrinsic and prejudicial. However, this evidence was intrinsic to the case at bar and was a proper application of West Virginia Rule of Evidence 404(b). Additionally, the circuit judge conducted a Rule 403 analysis and found that the evidence was more probative than prejudicial; thus, there was no abuse of discretion.

1. The Standard of Review.

Standard of review for trial court's admission of prior bad acts evidence involves three-step analysis; first, Supreme Court of Appeals reviews for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred; second, Court reviews de novo whether trial court correctly found that evidence was admissible for a legitimate purpose; and third, Court reviews for an abuse of discretion the trial court's conclusion that the other acts evidence is more probative than prejudicial.

State v. Mongold, 220 W. Va. 259, 254, 647 S.E.2d 539, 544 (2007), citing *State v. LaRock*, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va.R.Evid. 404(b).” Syl. Pt. 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. Pt. 1, *State v. McIntosh*, 207 W. Va. 561, 534 S.E.2d 757 (2000).

2. **The Evidence Surrounding the Braxton County Traffic Stop and Search Was Intrinsic to the Calhoun County Charges, and Its Admission Was a Proper Application of Rule 404(b) in Establishing a Common Plan or Preparation.**

Contrary to Appellant’s assertion; the evidence presented in the instant case regarding the Braxton County stop and search was intrinsic to the charges against him in Calhoun County. Appellant wrongly states that the evidence was extrinsic. In fact, Appellant seems to be attempting to have it both ways by earlier arguing that the two separate criminal transactions were the same for double jeopardy or collateral estoppel purposes, and now contending that they were separate transactions and extrinsic evidence where this Braxton County evidence should not have been admitted. It is true that the prosecutor made the argument for admission on the basis of *State v. Youngblood*, 217 W. Va. 535, 618 S.E.2d 544 (2005). (See Appellant Brief at 16; R. at 206.) However, the argument was also made that this was properly admissible under Rule 404(b) by establishing a plan and preparation in order to prove conspiracy and manufacturing of methamphetamine. (R. at 207.) The classification of this evidence on the basis of Rule 404(b) is indeed the correct basis for its admission. According to West Virginia Rule of Evidence 404(b):

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of *motive, opportunity, intent, preparation, plan, knowledge*, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. (Emphasis added.)

This was a proper application of Rule 404(b) evidence in order to show plan and preparation of the offenses with which Appellant was charged and in accordance with *McIntosh, supra*. As required by this rule, the State did file notice that it intended to present the testimony of Trooper Yost at trial as Rule 404(b) evidence. (R. at 363-64.)

The circuit court issued an order denying Appellant's motion to suppress this evidence. (R. at 390-400.) Among other findings, the circuit court found the evidence to be probative for purposes of showing preparation and concerted activity; or in other words, a plan, in accordance with Rule 404(b). (R. at 396.)

In its order, the circuit court ruled that the "other crimes" evidence from Braxton County was intrinsic to the crimes for which Appellant was charged in Calhoun County. (*Id.* at 396.) Among other citations, the circuit court cited *State v. Dennis*, 216 W. Va. 331, 607 S.E.2d 437 (2004), where this Court found that prior acts of abuse reported by the victim's grandmother and police officers were intrinsic evidence in order to complete the story of and provide context for the crime charged. (*Id.* at 351, 607 S.E.2d at 457.) This ruling was applied where the circuit court instructed the jury that the Braxton County evidence may indicate evidence necessary to complete the story of the entire transaction. (Tr., 137-38, April 3, 2007.) However, as previously outlined, it is quite clear that the other bad acts from Braxton County properly fit into the category of Rule 404(b) evidence.

The circuit court also conducted a Rule 403 analysis to determine if the probative value of this evidence outweighed any prejudicial effect as mandated in *Mongold, supra*. The circuit court ruled that the prejudicial effect was moderate, and any such effect was greatly outweighed by its probative value. (R. at 397.) In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), this Court held the following regarding the admission of other bad acts and analysis of any prejudicial effect:

In this context, it is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record Rule 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction. See *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 1502, 99 L.Ed.2d 771, 783-84 (1988); *United States v. Grissom*, 44 F.3d 1507, 1513 (10th Cir.), cert. denied, 514 U.S. 1076, 115 S.Ct. 1720, 131 L.Ed.2d 579 (1995).

(*Id.* at 311, 470 S.E.2d at 630.) As stated above, the circuit judge did give an instruction to the jury regarding the limited purpose of this evidence as required by *LaRock*. (Tr., 137-38, April 3, 2007.)

In light of all of this, Appellant's argument fails on this ground.

C. DESPITE MR. JONES DENYING THAT HE HAD ANYTHING TO DO WITH APPELLANT PRODUCING METHAMPHETAMINE IN HIS HOUSE, THERE WAS SUFFICIENT CIRCUMSTANTIAL EVIDENCE AGAINST THE FORMER FOR THE JURY TO FIND THAT HE LACKED CREDIBILITY. THUS, THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF CONSPIRACY.

Despite the fact that Mr. Jones denied any involvement in Appellant producing methamphetamine in his residence, there was sufficient evidence to convict the latter of conspiracy to produce a Schedule IV controlled substance. There was enough circumstantial evidence to allow the jury to determine Mr. Jones' testimony was not credible; and thus, a conspiracy existed between himself and Appellant. There was sufficient evidence whereby a rational trier of fact could convict Appellant of this offense.

1. **The Standard of Review.**

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pts. 1 and 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

2. **The Circumstantial Evidence Presented Regarding Mr. Jones as Well as the Evidence Against Appellant Were Sufficient to Convict the Latter of Conspiracy, Despite Mr. Jones' Denial That He Was Involved in the Production of Methamphetamine. The Evidence Was Sufficient for a Rational Trier of Fact to Find Appellant Guilty of this Offense Beyond a Reasonable Doubt.**

Appellant wrongly asserts that there was insufficient evidence to convict him of conspiracy to manufacture a Schedule IV controlled substance. Appellant uses this faulty argument to try to establish that the circuit court erred in denying his motion of acquittal based on this. However, in using the standard established in *Guthrie, supra*, there was sufficient evidence to convict Appellant of conspiracy to commit this offense.

It is true that Mr. Jones testified during this trial that he had no knowledge of Appellant placing the methamphetamine precursors and material to produce the drug in his house. (Tr., 190-91, April 3, 2007.) While Mr. Jones was on the stand, it was brought out that he entered a guilty plea for conspiracy. However, the circuit court instructed the jury that it was not to consider this plea agreement in determining whether Appellant was guilty of any of the offenses; but rather, it was only to be considered in determining the weight and credibility of Mr. Jones' testimony. (*Id.* at 193.) In essence, Mr. Jones testified that he had no involvement in the production of methamphetamine at his residence, yet he had pled guilty earlier to conspiracy to produce the drug at issue here. As previously stated, Mr. Jones did admit that some of the tubing belonged to him, he bought pills on the day he and Appellant were pulled over and he claimed ownership of some of the jars at his house. (*Id.* at 197, 200, and 203.) Additionally and as the prosecutor pointed out when Appellant first moved for acquittal on this ground, Mr. Jones testified that he smelled something funny in his house while Appellant was staying there and suspected methamphetamine production was taking place; yet he still was traveling with Appellant when they were pulled over and bought some of the pills the officer found. (*Id.* at 209.) So despite Mr. Jones denying that he had any involvement with the production of a Schedule IV controlled substance in his house, there was enough circumstantial evidence to establish a tacit agreement, at the least, to manufacture methamphetamine. When this is brought out in addition to the potential credibility problem Mr. Jones had regarding his guilty plea and subsequent inconsistent testimony, there was enough circumstantial evidence to convict Appellant of conspiracy.

West Virginia Code § 61-10-31 defines this offense of conspiracy as follows:

It shall be unlawful for two or more persons to conspire (1) to commit any offense against the State or (2) to defraud the State, the state or any county board of education, or any county or municipality of the State, if, in either case, one or more of such persons does any act to effect the object of the conspiracy.

Additionally, West Virginia Code § 60A-4-401 states in pertinent part the following:

(a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

Any person who violates this subsection with respect to:

(iii) A substance classified in Schedule IV is guilty of a felony and, upon conviction, may be imprisoned in the state correctional facility for not less than one year nor more than three years, or fined not more than ten thousand dollars, or both[.]

In light of this, there was sufficient evidence, examining it in the light most favorable to the State, for a rational trier of fact to find Appellant guilty of conspiracy beyond a reasonable doubt in this case. Regarding circumstantial evidence and credibility of witnesses, this Court held the following:

The rule, defining the character and prescribing the quantum of circumstantial evidence necessary to a conviction, saying that the facts and circumstances shown must be consistent with the hypothesis of guilt, inconsistent with every other hypothesis and conclusive in their nature and tendency, operates upon the facts found by the jury, not on mere items of evidence adduced, and a verdict will not be set aside as based on insufficient evidence, or as being contrary to the evidence, when the evidence relating to the facts found by the jury was conflicting and involved the credibility of witnesses, and the court can see that the jury may have found from the evidence facts sufficient to bring the case within the rule just stated.

Syl. Pt., *State v. Kidwell*, 62 W. Va. 466, 59 S.E. 494 (1907).

In ruling against Appellant at the sentencing hearing, the circuit judge stated,

Now the fact that he plead [*sic*] guilty [Mr. Jones] was before the jury and the jury was cautioned that the fact that he plead [*sic*] guilty is not evidence that Danny Minigh is guilty, but it is evidence that the jury could consider on the weight and credit to give to the testimony of James M. "Bub" Jones.

So the Court is of the opinion here that the jury was within its province to consider all of the testimony and all of the circumstances of the case, and arrive at the verdict that they did. In other words, circumstantial evidence together with the defendant's plea of guilty I'm sure were considered in determining the credit to give to Bub Jones' testimony.

So the Court denies the motion for new trial and adjudges the defendant guilty of conspiracy, a felony, as charged in the indictment. In accordance with the jury, the other charges are ordered dismissed.

(Sentencing Hr'g, 16, August 2, 2007.)

In light of all of this, there was sufficient circumstantial evidence presented in conjunction with Mr. Jones' credibility being at issue and the evidence presented against Appellant to convict him of conspiracy. Appellant attacks his conspiracy conviction due to the jury acquitting him of the other two offenses. However, Appellant could easily have been convicted of these offenses as well, and the jury's decision to acquit on those does not deem the conspiracy conviction erroneous. Using the standard established in *Guthrie, supra*, a rational jury could have found Appellant guilty beyond a reasonable doubt based on the evidence presented when looking at it in the light most favorable to the prosecution. Thus, Appellant's argument fails.

V.

CONCLUSION

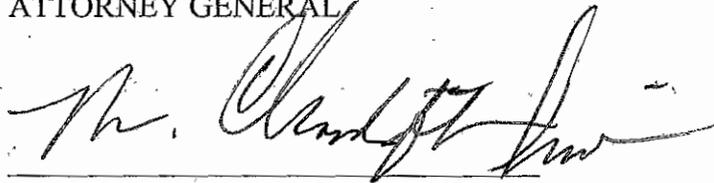
For the foregoing reasons, the judgment of the Circuit Court of Calhoun County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

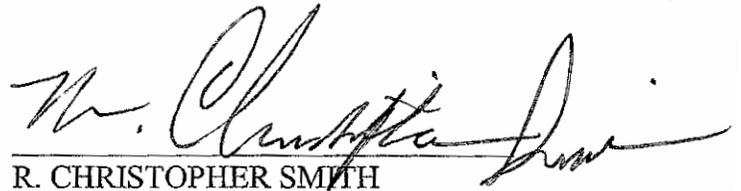
A handwritten signature in cursive script, appearing to read "R. Christopher Smith", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 11th day of December, 2008, addressed as follows:

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R. CHRISTOPHER SMITH