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NO. 34589

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

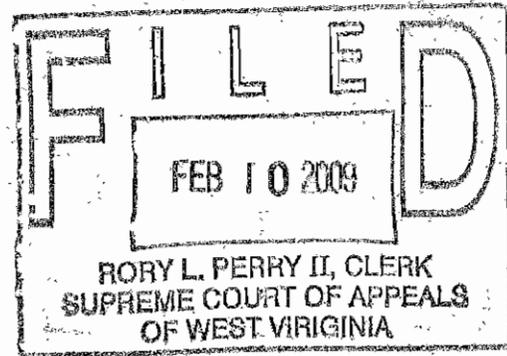
STATE OF WEST VIRGINIA,

*Appellee,*

v.

WALTER JESSIE,

*Appellant.*



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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I.

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

This is an appeal by Walter Jessie (hereinafter "Appellant") from the March 13, 2008, order of the Circuit Court of Mingo County (Thornsbury, J.), which denied his motion for reconsideration of sentence and re-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 unlawful assault in violation of West Virginia Code § 61-2-9(a), a lesser-included offense of malicious assault. Appellant claims that the circuit court committed various errors, denying him a fair trial.

## II.

### STATEMENT OF FACTS

The events of this case revolve around an altercation that occurred between Appellant and Randy Francis on August 1, 2004 in Mingo County. (R. at 1.) It is true that these two men had some enmity and ill will between them, and it appears that there were some other altercations. Some of the strife between these two seems to have had something to do with the fact that Randy Francis was having a relationship with Appellant's wife while they were separated. (Tr., 47-48, 100.) There was contradictory testimony in this case, but there was ample evidence presented to establish that Appellant was the aggressor who utilized significant physical force upon the victim, Mr. Francis.

On the evening in question, the victim was riding in a car with a woman named Tony Reynolds.<sup>1</sup> (*Id.* at 49.) According to Mr. Francis, Appellant and his wife were also in their car and flagged he and Ms. Reynolds down with headlights. (*Id.*) Appellant then stopped in the middle of the road. When Randy Francis got out of Ms. Reynolds' car, Appellant got out with what appeared to be either a pipe or bumper jack. (*Id.*) The victim testified that, at this point, he said to Appellant, "Walter, don't hit her car." (*Id.*) At this point, Appellant then took a swing at Mr. Francis with the object. Randy Francis testified that he woke up about eleven days later in the hospital. He initially suffered a broken collar bone and two areas of his skull were caved in. (*Id.*) Due to this beating, Mr. Francis had his lungs filled with blood which had to be pumped out at the hospital. (*Id.* at 53.) He testified that he did not hit Appellant first. (*Id.* at 54.) The victim said that at no time during this encounter did he do anything to cause the latter to hit him. (*Id.* at 51-52.) In fact, Randy Francis

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<sup>1</sup>Ms. Reynolds now goes by the name Antionette Hatfield, which was her name upon testifying at trial.

stated that he had never threatened Appellant days, weeks or even months prior to this incident. (*Id.* at 51.)

According to Ms. Reynolds, she was driving Randy Francis near the Red Jacket area of Mingo County. While driving, they noticed a car stopped near some mines that was flashing lights with the occupants waving to them. (*Id.* at 64.) The only difference between her testimony and that of the victim is that they turned around, upon being flagged down, and followed Appellant and his wife until they stopped their car. (*Id.*) Then Appellant got out of his vehicle and started toward Ms. Reynolds' vehicle. She stated that Appellant had a steel pipe in his hand, and when Randy Francis got out of the car, he beat the victim with it. (*Id.*) She also stated that Appellant hit her front windshield while attempting to hit Mr. Francis, causing a crack in it. (*Id.* at 66.) According to Tony Reynolds, Randy Francis did not hit, threaten or do anything to provoke Appellant during this encounter. (*Id.* at 66-67, 69-70 and 72.)

Mr. Francis' sister, Clarissa Tackett, testified that she was working in a convenience store down the road when this occurred, and Ms. Reynolds came in and told her and her husband what had happened. (*Id.* at 75-76.) She found her brother lying lifeless in a ditch covered in blood. (*Id.* at 77.) She stated that there was blood pouring out of him. (*Id.*) She and her husband picked Mr. Francis up and tried to stop the bleeding by wrapping the victim's head with their nephew's shirt who came shortly after they arrived. (*Id.*) They did this until the ambulance arrived.

Deputy Sheriffs Joe Smith and Jason Smith arrived on the scene. Deputy Sheriff Joe Smith testified that he found the victim laying in the roadway with his head bleeding and a large hole in the back of it. (*Id.* at 33-34.) According to Deputy Sheriff Joe Smith, the victim was taken via

emergency medical services (EMS) to Williamson Memorial and then later transferred to Cabell-Huntington Hospital. (*Id.* at 33.)

According to Mr. Francis, he now suffers from seizures and memory problems which did not occur prior to this crime. (*Id.* at 49-50.) Mr. Francis now lives with his sister, Clarissa, and the latter takes care of him. (*Id.* at 78.) She testified that he suffers from seizures as well. (*Id.* at 79.) She said that he complains of severe pain in his jaw and has to be physically restrained from biting his hands and other objects by holding him down and stuffing objects in his mouth. After this biting phenomenon occurs, the seizures begin. (*Id.*) She also testified that he suffers from memory loss, manifested by his doing something and then not remembering when asked about it. (*Id.* at 79-80.) His sister said that she noticed that he suffers from blackouts. (*Id.* at 80.) She also testified that she never observed him suffering from such problems before. (*Id.*)

As previously mentioned, a jury convicted Appellant of unlawful assault on May 9, 2007. (R. at 220.)

### III.

#### RESPONSE TO ASSIGNMENTS OF ERROR

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

#### A. SPEEDY TRIAL ERROR.

1. PETITIONER WAS DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 3 SECTION 14 OF THE *CONSTITUTION OF WEST VIRGINIA* AND SIXTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES*, BY THE TWO AND ONE-HALF (2 ½) YEAR DELAY FROM HIS INITIAL ARREST UNTIL HIS INDICTMENT AND TRIAL.

2. THE TRIAL COURT ERRED IN FINDING THAT PETITIONER WAS NOT PREJUDICED BY A TWO AND ONE-HALF (2 ½) YEAR DELAY FROM HIS INITIAL ARREST UNTIL HIS INDICTMENT AND TRIAL THUS DENYING HIM DUE PROCESS PROTECTION, UNDER ARTICLE 3 SECTION 10 OF THE *CONSTITUTION OF WEST VIRGINIA* AND THE FIFTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES*.
3. THE TRIAL COURT ERRED IN FINDING THAT THE PETITIONER WAIVED HIS RIGHT TO A SPEEDY TRIAL AS A RESULT OF HIS INITIAL COUNSEL'S FAILURE TO MOVE FOR A SPEEDY TRIAL THUS DENYING HIM DUE PROCESS PROTECTION, UNDER ARTICLE 3 SECTION 10 OF THE *CONSTITUTION WEST VIRGINIA* AND THE FIFTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES*.

State's Response:

There was no speedy trial violation, due process violation or error in the circuit court's ruling regarding waiver. However, Appellant assigns these related alleged errors for the first time in this direct appeal when they could have been addressed through review by the circuit court post-trial; thus, this Court need not address these matters.

- B. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE III, SECTION 14 OF THE *CONSTITUTION OF WEST VIRGINIA* AND THE SIXTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES* AS PETITIONER'S INITIAL COUNSEL FAILED TO MOVE FOR A SPEEDY TRIAL, THUS EFFECTIVELY WAIVING THIS RIGHT AS FOUND BY THE TRIAL COURT.

State's Response:

Appellant fails to meet the standard to establish that his initial counsel's performance fell below that of effective assistance. Regardless, he has chosen the wrong forum to assert such a claim.

- C. PETITIONER WAS DENIED DUE PROCESS PROTECTION, UNDER ARTICLE 2 SECTION 10 OF THE *CONSTITUTION OF WEST VIRGINIA* AND THE FIFTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES* BY THE STATE'S FAILURE TO INFORM THE PETITIONER OF ITS INTENT TO ELICIT FLIGHT EVIDENCE.

State's Response:

There was no Due Process violation with respect to any flight evidence, and no plain error analysis need occur. The first instance did not constitute flight evidence, and the second instance was objected to by his counsel and sustained by the circuit court.

IV.

ARGUMENT

- A. **APPELLANT RAISES THE SPEEDY TRIAL ISSUES FOR THE FIRST TIME IN THIS DIRECT APPEAL RATHER THAN INITIALLY PRESENTING THEM FOR REVIEW WITH THE CIRCUIT COURT. THEREFORE, THIS COURT NEED NOT EXAMINE THESE ISSUES. ALTERNATIVELY, THERE WAS NO SPEEDY TRIAL VIOLATION OR DUE PROCESS VIOLATION, AND THE CIRCUIT COURT DID NOT ERR REGARDING THE WAIVER ISSUE.**

Appellant failed to present the speedy trial issues to the circuit court for review in his various post-conviction motions. Instead, he brings up these issues on direct appeal. This Court has held that there would be no appellate review when a party does not raise an issue for review with the trial court, as was the case here. Thus, this Court need not review these matters. Regardless, there was no speedy trial violation. Appellant was not prejudiced nor had his Due Process rights been violated by any delay that occurred. Further, the circuit court did not err in its ruling regarding waiver of this issue by his initial counsel.

1. **The Standard of Review.**

“As a general matter, a defendant may not assign as error, for the first time on direct appeal, an issue that could have been presented initially for review by the

trial court on a post-trial motion.” Syl. Pt. 2, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998).

Syl. Pt. 2, *State v. Noll*, No. 33903, 2008 WL 5115733, at \*1, (W.Va. Dec. 3, 2008).

**2. Despite the Fact That Appellant’s Arguments Regarding Speedy Trial Violations Have No Merit, He Initially Raises These Issues on Direct Appeal Rather Than Having the Trial Court Review Them Via Post-Trial Motion. Therefore, This Court Need Not Examine This Matter.**

Appellant raises various speedy trial issues on direct appeal, yet he has failed to allow the trial court to review the issues in post-trial motions. Specifically, Appellant filed a motion for new trial, motion for acquittal and a notice of intent to appeal; none of which addressed the various speedy trial errors he alleges in his Appellant Brief. (R. at 233-36, 237-40 and 305-12.) In accordance with *Noll, supra*, these speedy trial issues are not reviewable on appeal due to Appellant’s failure to raise them in post-trial motions with the circuit court.

In *Noll*, where the Appellant raised an issue on appeal but failed to object and raise the issue for review with the circuit court post-trial, this Court held the following:

Inasmuch as the appellant failed to object at trial and failed to file a notice of intent to appeal assigning this issue as error as required by Rule 3(b) of the *West Virginia Rules of Appellate Procedure*, and in view of the State’s specific objection, we consider the appellant’s first assignment of error not properly before this Court and; therefore, without merit.

*Id.* at \*3. According to Rule 3(b) of the West Virginia Rules of Appellate Procedure,

Notice for Criminal Appeal. No petition from a criminal case shall be presented unless a notice of intent to appeal shall have been filed with the clerk of the court in which the judgment or order was entered within thirty days from the entry of such judgment or order. The notice of intent to appeal shall concisely state the grounds for appeal.

Since Appellant failed to raise the various speedy trial issues for post-trial review with the circuit court—in particular, ignoring them in his notice of intent to appeal—they are without merit, and this Court need not examine them.

Alternatively, even if this Court were to examine these issues, Appellant's arguments fail. Appellant was not denied his right to a speedy trial. It is true that Appellant was arrested on August 26, 2004, from a complaint and warrant issued on August 2, 2004. He was later indicted during the January 2007 term of the Mingo County Grand Jury. (R. at 123.) According to the State, this delay was due to the investigation originally being undertaken by Deputy Sheriff Jason Smith who subsequently left the Mingo County Sheriff's Office. There was no file opened on the matter or it was misplaced. In light of this, Deputy Sheriff Joe Smith had to re-investigate the case, basically from the beginning. (R. at 127; Tr., 4 and 36.)

Regarding the issue of speedy trial, this Court has held the following:

"A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial." Syl. Pt. 2, *State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829 (1982).

Syl. Pt. 6, *State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003). When the entire case is examined as a whole using this balancing test, there was no speedy trial violation. In particular, the reason for the delay was justified. As the State asserted at trial, there was no intentional delay on its part, but rather it was due to the initial investigating officer leaving and a completely new investigation having to take place. (Tr., 6.) According to the order denying Appellant's motion to dismiss, "Although the length of the delay was considerable the Court finds that the delay was

justified due to the fact that Deputy Joe Smith had to start a new investigation when Deputy Jason Smith left the Sheriff's Department. (R. at 127.) In *State v. Cox*, 162 W. Va. 915, 919, 253 S.E.2d 517, 519 (1979), this Court found the reason for the delay of two and one-half years between indictment and trial to be justified and not the fault of the State where the delay was due to the defendant being held in a federal penitentiary outside the jurisdiction of the state, the federal officials refusing to release him to temporary custody and efforts by the defendant to prevent extradition. In both this case and the case at bar, the delays were justified.

Appellant asserts that Rule 48(b) of the West Virginia Rules of Criminal Procedure was violated. According to West Virginia Rule of Criminal Procedure 48(b):

(b) By Court. If there is unnecessary delay of more than one year in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the circuit court, the court shall, on its own motion, dismiss the indictment, information or complaint, without prejudice. If there is unnecessary delay in bringing a defendant to trial, the court may, upon proper motion, dismiss the indictment, information or complaint.

Yet again, Appellant fails to establish that the delay was unnecessary considering the circumstances or that there was no good reason or justification. Despite a delay, the State was diligent in re-investigating the case from scratch and indicting Appellant once the evidence was gathered against him.

Additionally, Appellant wrongly contends that he was prejudiced and that his Due Process rights were violated by this delay. Appellant's primary assertion with regard to this is that the delay prevented him from being able to call four witnesses on his behalf to testify that the victim was the aggressor in light of past encounters between the two; two potential witnesses being deceased and two living out of state. It is worth noting that one of these witnesses, Kenneth Allen, Jr., was located and testified on Appellant's behalf. (Tr., 118-29.) During the hearing on this matter, the State

asserted that it had no knowledge of any unavailable witnesses until Appellant filed his motion. (R. at 126.) Appellant's defense at trial was that of self-defense. In light of that, it seems puzzling that he would assert that the unavailability of these potential witnesses prejudiced him. This is because, as was brought out in the order and the hearing, none of these potential witnesses were eyewitnesses to the crime. (R. at 126-27; Tr., 10.) The circuit court ruled that the affidavit Appellant submitted stating that the deceased and unavailable witnesses would testify that Mr. Francis was the person that provoked the incident was self-serving. (R. at 128.) As the State asserted and the circuit court noted in the order, the fact that these potential witnesses were not eyewitnesses but rather would testify to provocations that allegedly took place two months prior to the crime makes the testimony irrelevant and calls into question its probative value. (*Id.*) It is true that there was contradictory testimony in the trial. However, there was ample evidence presented through the testimony of Ms. Reynolds, the victim, Deputy Joe Smith and Clarissa Tackett that Mr. Francis was severely beaten. Both Mr. Francis and Ms. Reynolds gave extensive testimony that Appellant was the aggressor and that he beat Mr. Francis with an object.

Regarding Due Process, *State v. Carrico*, 189 W. Va. 40, 427 S.E.3d 474 (1993), is an analogous case. In that case, this Court upheld a two-year delay between the commission of an arson and an indictment where the sheriff initially did not have evidence to link the defendant to the fire, but the office quickly obtained an indictment after this time elapsed when the latter's son admitted to authorities that he assisted him in the act. *Id.* at 43, 477. In *Carrico*, this Court went on to hold,

As we held in *State ex rel. Leonard v. Hey* [ 269 S.E.2d 394]: It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right.

*Id.* at 43-44, 477-78. Despite the setback with the initial investigating officer leaving the sheriff's office, there was reasonable diligence in the investigation. As soon as sufficient facts to justify an indictment were discovered, one was brought against Appellant.

Contrary to Appellant's assertion, the trial court did not err in ruling that he had waived his right to a speedy trial. The circuit court ruled that it was undisputed that Appellant did not assert his speedy trial right. (R. at 127.) It is true that Appellant did not make this claim until he moved for a dismissal of the case. However, in light of the fact that there was no speedy trial violation and his Due Process rights were not violated, this claim is completely without merit.

In light of all of this, Appellant's arguments fail on this ground.

**B. APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL, AND HE HAS CHOSEN THE WRONG FORUM FOR SUCH AN ISSUE TO BE EXAMINED.**

Appellant fails to meet the standard to establish that his initial counsel provided ineffective legal assistance to him. Regardless, this issue should not be addressed on direct appeal, and he has chosen the incorrect forum to have the matter heard.

**1. The Standard of Review.**

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable

lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Syl. Pts. 5 and 6, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

“It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.” Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992).

Syl. Pt. 10, *State v. Hutchinson*, 215 W. Va. 131, 599 S.E.2d 736 (2004).

2. **When Applying the Standard Established in *Strickland, Supra*, and *Miller, Supra*, Appellant Fails to Establish That He Was Denied Effective Assistance of Counsel. However, He Has Selected the Wrong Forum to Have This Claim Heard.**

Contrary to Appellant’s assertion, his initial attorney did not fail to provide effective assistance of counsel. When examining the record using the standard established in *Miller, supra*, his original counsel’s performance did not fall below an objective standard of reasonableness, and the outcome of the trial would not have been different but for this performance. It appears a bit puzzling that Appellant earlier argued that the circuit court erred in finding that he did not assert his speedy trial right, and now states that his initial counsel gave him ineffective assistance for failing to raise this very issue. The primary reason that Appellant’s original counsel’s performance did not fall below an objective standard of reasonableness is, as established above, there was no speedy trial violation. As the circuit court ruled, the delay was of no fault of the sheriff’s office; and once enough evidence in the investigation was gathered, an indictment was handed down. Again, Appellant’s argument regarding the alleged speedy trial violation is that various defense witnesses became unavailable with the delay due to death and moving out of state. However, that does not take

away from the fact that this was no fault of the State, and that it used all diligence to investigate the crime in order to obtain an indictment. Additionally, none of these prospective witnesses for Appellant were eyewitnesses to the crime. So it seems very unlikely that he suffered from unprofessional conduct in the representation by his original attorney or that the result of the trial would have been different but for this attorney's actions.

Regardless of this, Appellant has chosen the wrong forum to raise an ineffective assistance of counsel claim. As this Court held in *Hutchinson, supra*, these claims are not to be brought before this Court on direct appeal. Appellant is to first raise this issue at the state habeas level. If he does not get the desired result, Appellant may then appeal the habeas decision to this Court once it can then review a fully developed record.

**C. THERE WAS NO DUE PROCESS VIOLATION WITH RESPECT TO ANY FLIGHT EVIDENCE IN THIS CASE, AND NO PLAIN ERROR ANALYSIS NEED BE APPLIED. THE FIRST ALLEGED INSTANCE WAS NOT FLIGHT EVIDENCE; AND WITH RESPECT TO THE SECOND, APPELLANT OBJECTED AND THE CIRCUIT COURT SUSTAINED THE SAME.**

There is no need for this Court to conduct an analysis of this issue using the plain error doctrine. That is because any flight evidence admitted did not rise to the level of a fundamental right being violated. Appellant did not suffer from a violation of his Due Process rights. The first alleged instance was not actually an admission of flight evidence, and the second resulted in the circuit court sustaining Appellant's objection.

**1. The Standard of Review.**

"To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the

fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. Pt. 1, *State v. Davis*, 220 W. Va. 590, 648 S.E.2d 354 (2007):

2. **The Issue of Alleged Improper Flight Evidence Did Not Rise to the Level of Plain Error in This Case, and No Analysis Need Be Made on the Basis of This Doctrine.**

Appellant wrongly asserts that his Due Process rights were violated and that the plain error doctrine analysis should be used by this Court to find that the circuit court erred in its handling of flight evidence. However, the handling of any flight evidence did not rise to the level of plain error in accordance with *Davis, supra*, and there was no violation of his Due Process rights.

Regarding flight evidence, this Court has held the following,

"In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect." Syl. Pt. 6, *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981)

Syl. Pt. 5, *State v. Spence*, 182 W.Va. 472, 388 S.E.2d 498 (1989). Such hearing did not occur in this case. During the direct examination of Deputy Sheriff Joe Smith, the following exchange occurred:

Prosecutor: I'm assuming later on someone arrested Walter Jessie, is that correct?

Deputy Joe Smith: That is correct.

Prosecutor: Why did you arrest Walter Jessie?

Deputy Joe Smith: Uh-We got a warrant for him and I believe they actually picked him up maybe in Ohio. I'm not sure, but I'm going to say that, or maybe back here. It was later, though. I don't have the date of arrest, but the incident occurred on the 1st of August, 2004, and we've got information he went to Ohio

right after it happened and we were unable to get him picked up because we could not find out where he was and he was arrested sometime after that back here.

(Tr., 34-35.) This was no attempt by the State to admit flight evidence to establish guilty conscience or knowledge. Instead, it was something mentioned by the officer in giving testimony on the events surrounding the arrest. This was all in the context of explaining the long process surrounding the arrest, investigation and indictment of Appellant. Right after this exchange, Deputy Joe Smith testified about how he interviewed various people including the victim and why there was delay in the investigation. (*Id.* at 36.) In fact, the deputy sheriff even seemed unsure as to whether Appellant was in Ohio after the incident occurred. There was no delving into any details of Appellant's leaving the State by the prosecutor; and in fact, the term "flight" or other similar language was not utilized in the questioning. In light of this, no in-camera hearing was necessary, and the circuit court did not err. There was no Due Process violation, and no plain error analysis need be applied.

So, the first alleged admission of flight evidence Appellant complains of was not really flight evidence admitted by the State as established in *Spence, supra*.

The second instance that Appellant characterizes as a Due Process violation during the testimony of Melanie Jessie also does not constitute plain error. There was no Due Process violation here. This is because when flight is brought out during testimony, Appellant's counsel objects, and the circuit court sustains the objection. During Ms. Jessie's cross-examination, the following exchange occurred:

Prosecutor: Eventually, were you with Walter when he was located, arrested?

Ms. Jessie: Uh- I was with him but not with him, He was- excuse me- he was Ginsenging when they picked him up. He was coming out of the mountains at the head of Pigeon Creek.

Prosecutor: How many days after this?

Ms. Jessie: It was about a month or two. I'm not sure.

Prosecutor: Did you wonder why it took a month?

Ms. Jessie: Why did it take a month?

Prosecutor: I asked the question. Did you ever think about it?

Ms. Jessie: No.

Prosecutor: Did Walter ever go to Ohio during this time?

Defense Counsel: Objection.

Court: Sustained. Approach.

(Bench Conference)

Court: No notice of flight?

Defense Counsel: Right. We didn't, and I didn't object to it earlier and I tried during the break to find it in the Rules of Evidence and things to try and find it and I couldn't. I did let it slip by.

Court: I'm going to sustain the objection. If you had evidence of flight we could have had an in camera hearing and we could have proceeded with it-

Prosecutor: -The first time I heard it was in the testimony today.

(Tr., 114-15.) There is absolutely no need for this Court to examine this issue by application of the plain error doctrine. The fact is that the attempted admission of the evidence was improper, the defense counsel objected and the circuit court sustained this objection. The prosecutor stated that he knew of no flight testimony until it was alluded to earlier by the deputy sheriff. (*Id.* at 115.) But regardless of when the State knew about this, the circuit court did not err in either instance.

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

V.

CONCLUSION

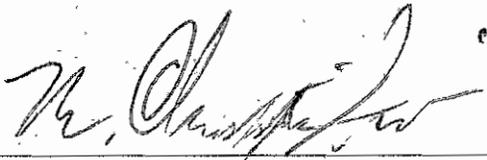
For the foregoing reasons, the judgment of the Circuit Court of Mingo County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,  
*Appellee,*

By counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



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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 10th day of February, 2009, addressed as follows:

Robert B. Kuenzel, Esq.  
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