

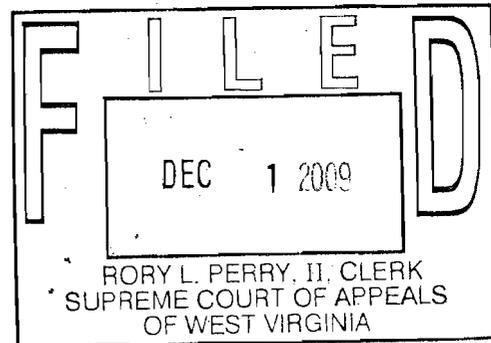
**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
at
CHARLESTON, WEST VIRGINIA**

No. 35225

**STATE OF WEST VIRGINIA,
Plaintiff,**

v.

**DAVID M. MARTIN,
Defendant.**



**OPENING BRIEF
ON BEHALF OF
DAVID M. MARTIN**

On Appeal from the
Circuit Court of Wood County, West Virginia
The Honorable J.D.Beane, presiding
Wood County Case #07-F-50

**Michele Rusen, #3214
Rusen and Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-6360
Counsel for
David M. Martin**

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OPENING BRIEF
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Now comes the Defendant-below and the Appellant herein, DAVID M. MARTIN (hereafter “Petitioner”), by and through his counsel, MICHELE RUSEN and pursuant to Rule 10 of the Rules of Appellate Procedure for West Virginia hereby files the within “*Opening Brief*” seeking reversal of his sentence and conviction for the offense of breaking and entering rendered in the Wood County Circuit Court, the Honorable J. D. Beane presiding.

The Wood County Circuit Court sentenced the Defendant to a term of not less than one nor more than ten years upon his plea of guilty to the offense of Breaking and Entering. Specifically, DAVID M. MARTIN appeals the Circuit Court’s ruling finding him competent to stand trial; the ruling denying his request for probation; and the State of West Virginia’s failure to abide by the terms of the *Plea Agreement* reached in this matter.¹

As the result of these rulings, DAVID M. MARTIN is now incarcerated at Mr. Olive State Penitentiary.

¹ For reasons which will be explained herein, the competency hearing was conducted by the Honorable Robert A. Waters and not Judge J. D. Beane.

I. Nature of the Proceedings Below

DAVID M. MARTIN was arrested and charged with the offense of Breaking and Entering on January 27, 2007. (*Criminal Complaint/Warrant, 07-F-53; Record at 14; Exhibit 1 to Petition for Appeal.*) DAVID M. MARTIN was subsequently indicted by the Wood County Grand Jury in May 2007 and was charged with a single count of Breaking and Entering in violation of West Virginia Code §61-3-12. (*Id.*)

In that indictment, the Defendant was charged with breaking into a building “used and occupied by the Catholic Community Homemaker Services, Inc.” located at “130-4th Street, Parkersburg, West Virginia. . . with the intent to commit larceny therein.” (*Record at 1.*) This offense was alleged to have occurred in January, 2007. (*Id.*) Attorney Joseph Munoz was appointed to and did represent DAVID M. MARTIN in connection with all proceedings in this matter preceding the within appeal. (*Record at 12.*)

During the eighteen months that followed the Defendant’s indictment, a number of hearings were conducted in this matter. These hearings were conducted largely for the purpose of addressing the issue of DAVID M. MARTIN’s competency to stand trial and criminal responsibility. Ultimately, DAVID M. MARTIN pled guilty to the indictment pursuant to a *Plea Agreement* reached with the State of West Virginia. (*Record at 55-56.*) Pursuant to this *Plea Agreement*, the State of West Virginia made a non-binding recommendation that the Defendant receive probation, an agreement that the State of West Virginia failed to honor. (*Id.; Tr. of 12/15/08 at 31-32.*) Accordingly, Judge J. D. Beane sentenced the Defendant to one to ten years in prison. It is from this sentence that the Defendant now appeals. (*Tr. of 12/15/08 at 32-33; Record at 74-76.*)

II. Statement of the Facts

On January 28, 2007, DAVID M. MARTIN was arrested by the Parkersburg Police Department after being found inside the Catholic Community Homemaker Services, Inc. (*Record at 14.*) It appears that the Defendant was originally released upon \$10,000 bond or if he posted a recognizance bond immediately following his arrest on January 28, 2007. (*Record at 10.*) However, on March 12, 2007 when DAVID

M. MARTIN appeared before Judge Jeffrey B. Reed for a status hearing, he was apparently “in custody.” (*Record at 13.*)

Following a preliminary hearing on February 6, 2007, the case was bound over the Grand Jury. (*Record at 11.*) No counsel appeared with DAVID M. MARTIN at the preliminary hearing according to the Magistrate Court record, but counsel was appointed to represent him by Order of March 13, 2007. (*Record at 11-12.*)

On April 18, 2007, shortly before the return of the indictment, Attorney Munoz informed the Court that he would be filing a “*Motion for a Mental Evaluation.*” (*Tr. Of 4/18/07, 2-3.*) That motion was in fact filed by Attorney Munoz on April 20, 2007. (*Record at 27.*)

The record of these proceedings reflects that on May 7, 2007, DAVID M. MARTIN appeared for hearing upon the “*Motion for a Mental Evaluation*” via video conferencing from William R. Sharpe Hospital. (*Tr. 5/7/07; Record at 29.*) According to Attorney Munoz, DAVID M. MARTIN had posted bond on April 18, 2007; shortly thereafter, DAVID M. MARTIN “was institutionalized at William R. Sharpe Hospital.” (*Tr. 5/7/07, 4.*) At that point, trial was scheduled for the next term of Court on August 14, 2007 and the Defendant’s *Motion for Mental Evaluation* was granted without objection. (*Id.; Record at 29-30.*)

DAVID M. MARTIN’s case next came before the Court on July 13, 2007. At that time, the mental evaluation had been completed, but no report had yet been issued. (*Tr. 7/13/07, 7.*) The Defendant was not present for that hearing. (*Id.*) Following that hearing, by order of July 31, 2007 the Defendant’s case was transferred to Judge Robert A. Waters “due to the fact that counsel for the Defendant, A. Joseph Munoz was with the law firm of William O. Merriman, Jr.”² (*Record at 44.*)

On August 24, 2007, DAVID M. MARTIN appeared before Judge Robert A. Waters for further hearing. At that point in time, the mental evaluation had been completed. (*Tr. 8/24/07, 2.*) The State of West Virginia noted that “[t]he sum and substance of the doctor was that Mr. Martin is both competent to stand trial and was, under the laws of West Virginia criminally responsible at the time of the alleged acts.” (*Id.*) Judge Waters stated that “[he hadn’t] seen the report from this doctor.” (*Id.*)

² Judge Beane’s fiancée Brenda Bailey is employed by William O. Merriman, Jr. Accordingly, Judge Beane disqualifies himself from all matters involving Mr. Merriman’s firm.

Nevertheless, the Court “set this for trial” on October 2, 2007. (*Id at 3.*)

Notwithstanding the finding that DAVID M. MARTIN was competent and criminally responsible, the Defendant was transported to this hearing from William R. Sharpe Hospital and was transported back to the hospital at the conclusion of this hearing. (*Tr. 8/24/07, 4-7; Record at 42-43.*) The Court assented to return DAVID M. MARTIN to William R. Sharpe Hospital and noted that DAVID M. MARTIN was homeless, with no place to stay in Wood County. (*Id.*)

By October 2, 2007, following the transfer of this case back to Judge Beane, DAVID M. MARTIN had purportedly reached a plea agreement with the State of West Virginia.³ (*Record at 44-45.*) However, the State noted that since the hearing on August 24, 2007, DAVID M. MARTIN had continued to stay at William R. Sharpe Hospital, and had again been transported from that facility for the hearing before Judge Beane. (*Tr. 10/2/07, 10-11.*) Based on this circumstance, the Court continued the matter pending DAVID M. MARTIN’s release from William R. Sharpe Hospital and a determination of whether the Defendant could be discharged from that facility. (*Id. at 14-20.*) Documents sent by William R. Sharpe Hospital to the Court and concerning the Defendant indicated that the physician at the hospital intended to “reinitiate final commitment proceedings” . . . until the Defendant was “stabilized.” (*Letter of Nitin Malik, M.D., Record at 49A.*)⁴

After DAVID M. MARTIN failed to appear for the calling of the docket on January 24, 2008, he was again arrested and taken in to custody. (*Record at 51.*) He next came before the Court on February 27, 2008 at which time “counsel for the Defendant request[ed] that a date be set for a plea to be presented to the Court” and the State “request[ed] a date be set for trial in the event the plea is not accepted.” (*Record at 54.*)⁵ Trial was set for April 22, 2008; a change of plea was scheduled for March 24, 2008. (*Tr. of 2/27/08, 3-4.*) Counsel Munoz requested that Mr. Martin be released on bond again, and advised the Court that DAVID M. MARTIN had been living with his

³ The case was sent back to Judge Beane’s court after A. Joseph Munoz left William O. Merriman’s law firm.

⁴ This letter was sealed by Order of Judge Beane, and counsel has submitted it to this Court as a sealed exhibit.

⁵ The Order inaccurately reflects the date of February 27, 2007 instead of February 27, 2008.

brother in Morgantown. Following lengthy discussion, the Court released the Defendant on bond, with conditions for his monitoring. ((*Tr. of 2/27/08, 13.*)

For reasons not apparent from the record, no hearings were held on March 24th or April 22nd. However, the Defendant appeared on May 14, 2008 and entered a plea of guilty pursuant to a *Plea Agreement* with the State of West Virginia. (*Tr. of 5/14/08; Record at 55-65; 67-68.*)⁶ Pursuant to that *Plea Agreement*, DAVID M. MARTIN pled guilty to the single count of Breaking and Entering charged in the indictment, and agreed to make restitution. (*Record at 55-56.*) The State of West Virginia agreed to “a non-binding recommendation of probation.” (*Id.*) Based upon the colloquy between the Court and the Defendant, the Court accepted DAVID M. MARTIN’s plea of guilty and referred the matter for a pre-sentence investigation. (*Tr. 5/14/08, 27.*)

On July 17, 2008, DAVID M. MARTIN and counsel Munoz again appeared before Judge Beane for sentencing. Mr. Munoz addressed the Court as to sentencing:

I am here today to ask the Court to grant Mr. Martin probation I this matter. I know this is a difficult case, but from my experience with Mr. Martin, he is one of my first felony cases I received. He’s, I believe, tried his best to make his appearances. He’s tried his best to be contrite before this Court. I think it is obvious from the record and from some of the various pleadings we have had in this case, that he does have some sort of mental conditions that prevent him from acting with normal behavior. I think he is given to certain flights of acting like a child, for whatever reasons, and we’re all here left to deal with that.

And I don’t think that, in the incident in question, or the incident that he pled to involving the break-in into the Catholic Community Resources, he was there to damage any property. It was a cold day in the wintertime. He went in there for heat and warmth. Now, I don’t think there is anything to excuse his behavior. There are other options to do that, besides break into a building, but I think that is what his motivation was.

Again, I really get stuck on Mr. Martin’s mental status. I know that he has been evaluated and found competent to stand trial, but there are still some issues there, that I think greatly affect his behavior. (*Tr. 5/18/08, 23.*)

At that point, the Court sent the Defendant to Anthony Correctional Center for a diagnostic evaluation. However, after only two days at the Anthony Center, Mr. Martin

⁶ The May 14, 2008 Order also incorrectly lists the date as May 14, 2007 instead of 2008.

was sent back to the Regional Jail because of “mental health issues” which resulted in bizarre behaviors. Warden Teresa McCourt reported that Anthony Center did not “have the capabilities of meeting [DAVID M. MARTIN’s] mental health needs which would result in an inaccurate evaluation.” (*Exhibit 4 to Petition for Appeal.*) Thus, sentencing was scheduled for November 26, 2008.

Mr. Martin’s sentencing finally occurred on December 15, 2008. (*Tr. 12/15/08.*) As counsel Munoz pointed out, prison is not the place for someone with the mental problems that DAVID M. MARTIN has. (*Id. at 30.*) Despite the State of West Virginia’s agreement to recommend probation, the Assistant Prosecutor stated the following:

Given the information contained in the presentence report and Mr. Martin’s behavior since the time of the initial presentence report, I think it would be difficult for the Court to make a finding that he would be likely to comply with any form of alternative sentence, whether it be probation or house arrest.

I don’t believe that, at this point in time, there is a residence available to him, anyway, so that really leaves us with the choices of probation or incarceration in the state penitentiary. I find it hard to believe, based upon the information that I have available to me, that Mr. Martin could comply with the terms and conditions of probation or other alternative sentence. (*Tr. 12/18/08, 31-32.*)

No objection was made to the State of West Virginia’s failure to abide by the *Plea Agreement* reached in this matter. The Court then proceeded to sentence the Defendant to a term of not less than one nor more than ten years in the penitentiary, with a credit for 82 days previously served. (*Id. at 33.*) Further, his motions for alternative sentence and for probation were denied. (*Id. at 34.*) The Defendant appeals from these rulings of the Wood County Circuit Court which he contends are clearly erroneous, and are not supported by the record and he therefore seeks a reversal of those rulings.

III. Issues Presented

Did the Wood County Circuit Court err in accepting the Defendant’s plea of guilty when questions concerning DAVID M. MARTIN’s criminal responsibility and competency to stand trial persisted?

Was it error to permit the State of West Virginia to breach the Plea Agreement in this case?

IV. Argument

A. The Wood County Circuit Court erred in accepting the Defendant's plea of guilty when questions concerning DAVID M. MARTIN's criminal responsibility and competency to stand trial persisted.

The requirements which must be adhered by court in the taking of a guilty plea are well settled:

When a criminal defendant proposes to enter a plea of guilty, the trial judge should interrogate such defendant on the record with regard to his intelligent understanding of the following rights, some of which he will waive by pleading guilty: 1) the right to retain counsel of his choice, and if indigent, the right to court appointed counsel; 2) the right to consult with counsel and have counsel prepare the defense; 3) the right to a public trial by an impartial jury of twelve persons; 4) the right to have the State prove its case beyond a reasonable doubt and the right of the defendant to stand mute during the proceedings; 5) the right to confront and cross-examine his accusers; 6) the right to present witnesses in his own defense and to testify himself in his own defense; 7) the right to appeal the conviction for any errors of law; 8) the right to move to suppress illegally obtained evidence and illegally obtained confessions; and, 9) the right to challenge in the trial court and on appeal all pre-trial proceedings. *Syllabus Point 3, Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1975).

Notwithstanding these requirements, when a defendant obviously suffers from mental illness, additional scrutiny is necessary as well.

Where a circuit court has found that a defendant in a criminal case where the possible punishment is life imprisonment without mercy is competent to stand trial, but subsequent to the competency hearing, the defendant attempts to commit suicide, then against advice of counsel indicates his desire to plead guilty to the charges in the indictment, before taking the plea of guilty, the trial judge should make certain inquiries of the defendant and counsel for the defendant in addition to those mandated in *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1975). The court should require counsel to state on the record the reason why counsel opposes the guilty plea. The court should then ask the defendant to acknowledge on the record that he understands his counsel's statements and if in view of them he still desires to plead guilty. If the defendant then states he still desires to plead guilty, the court may accept the plea." *Syllabus point 6, State v. Hatfield*, 186 W. Va. 507, 413 S.E.2d 162 (1991); *Syllabus Point 5, Hatfield v. Painter*, 222 W.Va. 622, 671 S.E.2d 453 (2008).

While DAVID MARTIN is not facing a life sentence, and while his attorney did not oppose this guilty plea, nevertheless, additional care must be exercised and careful scrutiny must occur when dealing with an obviously mentally ill person such as DAVID MARTIN. As late as November 20, 2008, officials at Anthony Center noted the Defendant's bizarre behaviors and statements. (*Exhibit 4 to Petition for Appeal.*) Further, the psychiatric report of August 2007 finding DAVID MARTIN competent to stand trial and criminally responsible notes his many hospitalizations and treatment for mental illnesses including bi-polar disorder, schizoaffective disorder and poly-substance abuse. (*Psychiatric Report under seal.*)

It is true that Judge Waters found DAVID MARTIN competent to stand trial in August, 2007 based upon the evaluating psychiatrist's report. However, the Defendant's hospitalization at Sharpe Hospital continued for several months, as did the bizarre behaviors at Anthony Center. "Where a criminal defendant has already been afforded a competency hearing pursuant to W. Va. Code §§ 27-6A-1(d) & -2 (1983) and been found mentally competent to stand trial, a trial court need not suspend proceedings for purposes of permitting further psychiatric evaluation or conducting an additional hearing unless it is presented with new evidence casting serious doubt on the validity of the earlier competency finding, or with an intervening change of circumstance that renders the prior determination an unreliable gauge of present mental competency." *Syllabus point 4, State v. Sanders*, 209 W. Va. 367, 549 S.E.2d 40 (2001). The facts and circumstances reflected within the record of this case present such a scenario. The Petitioner therefore asserts that it was error for the Wood County Circuit Court to accept his guilty plea and sentence him without obtaining an additional mental evaluation.

B. The State of West Virginia breached the Plea Agreement in this case.

Adding to the error in this proceeding was the State of West Virginia's failure to abide by the *Plea Agreement*. Instead of adhering to the agreement that the State of West Virginia would make a non-binding recommendation of probation, the State of West Virginia changed gears on December 15, 2008 and argued against the Defendant receiving probation.

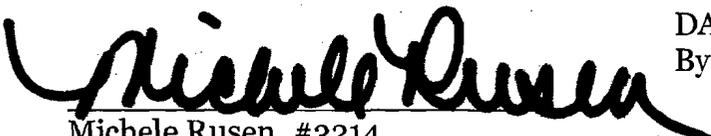
It is a longstanding rule that “[a] prosecuting attorney or his successor is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon.” State ex rel. Gray v. McClure, 161 W. Va. 488, 242 S.E.2d (1978). It is also crystal clear from the record in this case that the Assistant Prosecutor who had agreed to recommend probation for the Defendant argued against probation at the sentencing hearing in this matter.

When a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable “right” inures to both the State and the defendant not to have the terms of the plea agreement breached by either party. *Syllabus Point 4, State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998).

This violation of the State’s agreement was un-remarked upon by the Court or by Defendant’s counsel. Moreover, this breach is particularly egregious given the fact that DAVID M. MARTIN pled guilty “straight-up” to the single count of this indictment with the only inducement offered by the State of West Virginia being its recommendation of probation, even though this recommendation was nonbinding on the Court. Without the inducement of the State’s recommendation of probation, the Defendant had no absolutely incentive to plead guilty. Thus, the effect of this error in this case cannot be understated or undone absent a remand of this matter.

V. Conclusion and Prayer

For all of the reasons set forth herein, the Petitioner, DAVID M. MARTIN respectfully prays that this Court enter an *Order* reversing the ruling of the Wood County Circuit Court sentencing DAVID M. MARTIN to prison; that this Court set aside the guilty plea herein; that this matter be remanded to Wood County Circuit Court; and for such further and other relief as this Court may deem appropriate.



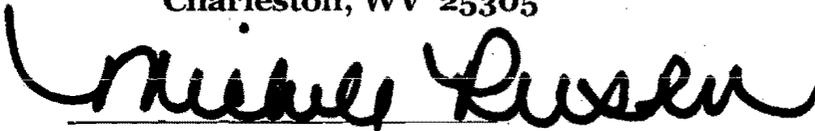
Michele Rusen, #3214
Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-6360

DAVID M. MARTIN
By Counsel,

CERTIFICATE OF SERVICE

This 30th day of November, 2009, the undersigned certifies that the enclosed "*Opening Brief on Behalf of David M. Martin*" in case No. 35525, *State of West Virginia v. David M. Martin* was served upon the following person, by mailing, first class mail a true and accurate copy thereof to:

**Dawn E. Warfield
Deputy Attorney General
Office of the Attorney General
State Capitol
Charleston, WV 25305**

A handwritten signature in black ink that reads "Michele Rusen". The signature is written in a cursive, flowing style.

**MICHELE RUSEN, # 3214
1208 Market Street
Parkersburg, WV 26101
(304) 485-6360**