NO. 35273

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

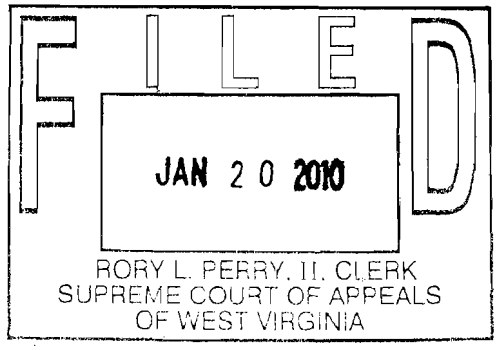
STATE OF WEST VIRGINIA,

Appellee,

v.

CHRISTOPHER S. DELLINGER,

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

Following a jury trial, Appellant Christopher S. Dellinger, defendant below (hereafter "Appellant"), was convicted of three counts of Falsifying Accounts under West Virginia Code § 61-3-22, and one count of Obtaining Money, Goods, Services, or Property by Fraudulent Pretenses Using a Common Scheme under § 61-3-24(d). Upon Appellant's conviction, the trial court ordered a sixty-day diagnostic evaluation at the Anthony Center. (R. at 41.) By amended sentencing order of January 24, 2009, the trial court sentenced the Appellant to four to forty years, said sentence suspended and the Appellant placed on home confinement for two years, followed by five years of probation upon the listed conditions including a sixty-day jail sentence to be served on weekends. (R. at 208-10.) This appeal is predicated upon this order.

II.

STATEMENT OF FACTS

On October 2, 2007, the Appellant was indicted on six counts (Counts 1-6) of Falsifying of Accounts, and one count (Count 7) of Obtaining Money, Goods, Services or Property by Fraudulent Pretenses Using a Common Scheme. He was convicted of Counts 2, 5, 6 and 7. He was acquitted of Counts 1, 3, and 4.

In 2005 the Appellant, then a Braxton County Deputy Sheriff, was responsible for the administration of several grant agreements[1] from the Governor's Commission on Drunk Driving Prevention ("CDDP") to the Braxton County Sheriff's Department. These grant agreements funded additional anit-DUI patrols. (Tr. 304-05.) As administrator of the grant, the Appellant chose which deputies to send out on DUI patrol, and the number of hours they would work. Upon completion of their patrols, each deputy was responsible for entering information relating to all of his contacts, requests for license histories, and copies of citations issued, on CDDP forms which were submitted to the Appellant. The Appellant would then submit them to the CDDP.

State's witness, former Braxton County Deputy Sheriff Phillip Huff, testified that he had worked numerous DUI shifts at the same time as the Appellant. Although they allegedly worked the same shifts, Deputy Huff testified that he never heard the Appellant use his police radio. (Tr. 244, 247.) Several law enforcement officers, who also worked DUI shifts, found the Appellant's lack of radio traffic unusual. (Tr. 241, 266-67, 275, 284-85.) Deputy Huff contacted State Police Sergeant John Bonazzo telling him that he believed the Appellant was claiming credit for hours he

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[1]These grant agreements were executed on February 3, 2005, May 25, 2005, and October 13, 2005. Braxton County would be reimbursed up to $8,000.00 for each grant agreement. (Tr. 98-99.)

had not worked. (Tr. 247.) Deputy Huff's complaint was corroborated by former Braxton County Deputy Sheriff Travis Flint. (Tr. 278-79.)

The Appellant's trial began on February 12, 2008. The State's first witness was Lieutenant Charles Zirkle, Executive Director of the West Virginia Commission on Drunk Driving. (Tr. 90.) Lieutenant Zirkle testified that Braxton County received several grants in 2005. The grant applications were submitted by the Appellant. (Tr. 92.) Grant requirements were strict. Expenditures were limited to activities directly related to drunk driving prevention. (Tr. 98.) The grant did not include funding for administrative duties such as filling out grant forms. (Tr. 106.)

The State next called investigating officer Charles Trader of the West Virginia State Police. Trader recounted his investigation, and thoroughly reviewed the evidence supporting each count of the indictment. First, Trader obtained copies of all of the relevant paperwork including Appellant's time sheets, copies of the E-911 radio logs, CDDP forms, and traffic citations. (Tr. 113, 116-17.) Each document contained certain information which should have been corroborated by information on the other documents. For example, on evenings when the Appellant claimed to be working a DUI shift, the county's radio logs should have reflected every stop, license check, and citation issued. The radio log should also have reflected when the Appellant signed in and when he signed out. Instead, the log sho

wed little or no radio traffic. During times when the Appellant was allegedly on DUI patrol, the radio log would often reflect that he had, in fact, signed out for the day. (Tr. 121-68.) Several of Appellant's time sheets, documents filled out for both DUI and ordinary patrols, claimed the Appellant was on DUI patrols. Contrary to the conditions of the grant, these time sheet entries were not corroborated by CDDP paperwork.

Officer Trader also spoke with the Appellant. (Tr. 114.) The Appellant admitted that he improperly characterized administrative time as time spent on DUI patrol. He also claimed that some shifts were billed to CDDP time by mistake, and that some of his DUI patrols were spent performing regular sheriff's duties. (Tr. 114.) Although the Appellant promised to provide a list of dates, Lieutenant Trader never received one. (Tr. 116.)

The State next called Braxton County Sheriff Howard Carpenter. (Tr. 201.) Sheriff Carpenter testified that he hired the Appellant as home confinement officer and grant writer. (Tr. 202.) The Sheriff delegated all grant writing duties to the Appellant. During the investigation Sheriff Carpenter spoke with the Appellant, who admitted that he had improperly billed time to the CDDP grant, and that he would pay back the money from vacation pay he had coming. (Tr. 204, 211.) This conversation was corroborated by Lucille Thayer, Chief Tax Deputy for the Braxton County Sheriff's Department. (Tr. 229, 234-35.)

III.

ARGUMENT

A & B. THE APPELLANT HAS FAILED TO PROVE THAT JUROR HYER AND JUROR LANE FAILED TO PROVIDE MATERIAL INFORMATION DURING *VOIR DIRE*.

1. The Standard of Review.

> Just as the trial court has discretion over *voir dire* examination, so should it have discretion on the question of whether a new trial should be granted because of false answers given by a prospective juror on such examination.

West Virginia Human Rights Commission v. Tenpin Lounge, 158 W. Va. 349, 211 S.E.2d 349 (1975).

2. **Discussion.**

The Appellant first claims that two jurors failed to answer several relevant *voir dire* questions. In *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 556 (1984), the United States Supreme Court held that in order to obtain a new trial when there is juror *deceit* during *voir dire* the moving party must:

> first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

There is no dispute that Juror Amber Hyer placed a message on the Appellant's My Space[2] page at some shortly before the Appellant's trial. (Tr. 10, June 11, 2008.) Although the Appellant knew, he did not reveal this fact until after the jury had returned their verdict. It is also undisputed that Juror Hyer did not reveal this information during *voir dire.* Upon discovering this, the trial court ordered an investigation and scheduled an evidentiary hearing.

The trial court convened the evidentiary hearing on June 11, 2008. The State first called investigating officer Corporal Michael Anderson. (Tr. 4, June 11, 2008.) Corporal Anderson testified that he taped an interview with Juror Hyer in which she stated that she had responded to a posting the Appellant had placed on his My Space account a few days before Appellant's trial. This was the sum and substance of her communication with him. (Tr. 11, June 11, 2008.) When asked to describe her relationship with the Appellant, Juror Hyer indicated that she knew him, not super friendly or anything of that nature. (Tr. 12, June 11, 2008.)

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[2]The Appellant was listed as one of 120 friends on Juror Hyer's My Space site. (Tr. 15, June 11, 2008.)

The State next called Juror Hyer. (Tr. 13, June 11, 2008.) Ms. Hyer discovered she had been summoned for jury duty sometime in late January early February. (Tr. 14, June 11, 2008.) Her summons did not mention the Appellant. (Tr. 15, June 11, 2008.) She admitted that the Appellant was one of her My Space friends. (*Id.*) When asked to describe her relationship with the Appellant she testified that she did not have one. (*Id.*) Although they once lived in the same apartment complex, they had never met or spoken face-to-face. (Tr. 16, June 11, 2008.)

When asked why she did not state that the Appellant was a My Space friend, Juror Hyer responded:

> Bad Judgment, I guess. I just didn't feel like I really knew him. I didn't know him personally. I never, never talked to him. And I just felt like, you know, when [the court] asked if you knew him personally or if he ever came to your house or have you been to his house, we never did. So I just didn't feel like I really did know him.

(Tr. 17, June 11, 2008.)

Later she testified, unambiguously, that the fact that the Appellant was a My Space friend, and had lived in the same apartment complex had no affect on her ability to impartially weigh the evidence. (*Id.*)

Juror Hyer also testified that she had not told the trial court that she went to the same church as Sgt. Bonazzo. Her church, which numbers 500 attendees, conducts three different services. (Tr. 28, June 11, 2008.) Juror Hyer testified that she had seen Bonazzo at church before but had never spoken to him. (Tr. 20, 27, June 11, 2008.) Fred Slaughter was the chief of the Gassaway Volunteer Fire Department. Juror Hyer's husband was a volunteer firefighter ten years before the Appellant's trial. (Tr. 22, June 11, 2008.) Juror Hyer's brother-in-law was an EMT supervised by Brenda Slaughter. Juror Hyer testified that she had never spoken to Brenda Slaughter. (Tr. 22, June 11,

2008.) Juror Hyer's sister-in-law was Kirk Frame. Ms. Frame was Braxton County Commissioner, and State's witness, Terry Frame's daughter. Despite Appellant's speculation there is no evidence that the Appellant spoke with Terry Frame. When asked Juror Hyre testified that she did not know Ms. Frame or had spoken with her. (Tr. 23, June 11, 2008.)

Upon consideration of the evidence, including the testimony of Juror Hyer and Trooper Anderson, the trial court found as a matter of fact that Juror Hyer had no knowledge about the case prior to sitting as a juror and had no personal relationship with any of the witnesses or the Appellant. (Tr. 37, June 11, 2008.) The court went on to rule:

> It would have troubled the Court if Amber Hyer would have been a social acquaintance of the defendant or something of that sort. While I respect [defense counsel's] argument involving mere acquaintance, I don't know that Ms. Hyer's relationship with any of these parties or with the defendant even comes up to the definition of an acquaintance, in the matter, quite frankly, I would never get a jury in this county on any case because this county is so small that people come in contact everyday.... But the issue of mere acquaintance, I do not believe it's sufficient and enough to show bias by a juror in the matter.

(Tr. 37-38, June 11, 2008.)

The trial court's decision fell well within the bounds of its discretion. Although the Appellant insists that Juror Hyre intentionally withheld information during *voir dire*, there is no evidence to support his claim. She did not respond falsely when asked whether she knew the Appellant. The record unequivocally proves that any contact between the two was incidental and anonymous. The same can be said for the other witnesses. Indeed, there is no evidence that Juror Hyre ever spoke to them. She may have known that they existed, but that was as far as her familiarity went.

Appellant also claims that Juror Teresa Lane failed to disclose a pre-existing relationship with Fred and Brenda Slaughter. As Juror Lane was not called to testify at the June 11, 2008, evidentiary hearing, the Appellant's contentions are wholly unsupported by the record.

C. NEITHER JUROR MACE OR BENDER DEMONSTRATED DISQUALIFYING PREJUDICE.

1. The Standard of Review.

> In reviewing the qualifications of a jury to serve in a criminal case, we follow a three step process: Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court.

State v. Miller, 197 W. Va. 588, 600-01, 476 S.E.2d 535, 547-48 (1996).

2. Discussion.

Appellant next claims that the trial court erred by not striking for cause Jurors Mace and Bender.[3] Appellant argues that the trial court did not consider the jurors' relationships to the witnesses and defendant significant, and placed too much weight on their promises to be fair. Appellant then, "incorporates by reference hereto all arguments raise *supra* relating to juror bias and remedies therefor as if recited verbatim herein." Appellant's Brief at 32-33. Counsel for the Appellee has absolutely no idea what the Appellant is arguing.

When asked prospective juror Joan Mace testified that she knew former Braxton County Deputy Jordan, Deputy Clay and one other party.[4] (Tr. 45.) Although Trooper Jordan had been to

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[3]Appellant peremptorily struck both jurors after the trial court refused to strike them for cause.

[4]That party's name was not transcribed.

her home, it had been a long time since his last visit. (*Id.*) Trooper Jordan's son and prospective Juror Mace's son were on the same wrestling team. The other witnesses were just acquaintances. (*Id.*) Juror Mace testified that he would no afford greater weight to any of the three officers' testimony and would be able to weigh the evidence fairly and impartially. (Tr. 46.)

The trial court ruled that any contact between Juror Mace was not sufficiently substantial to justify a strike for cause:

> It was more of, she takes her kids to games and to extra curricular activities at school and runs into these people. . . . You know, again, this is a small community. I believe she said she could be fair and impartial and I believe that she would be.

(Tr. 62.)

Juror Bender was a previous employee at the Central Regional Jail. Her husband worked at Gilmer Federal Prison. (Tr. 34.) She also knew Troopers Jordan's and Bonazzo's wives. (Tr. 40.) It had been several months since she had last seen the troopers' wives. (Tr. 41.)

Once again the trial court found:

> I'm going to overrule the motion. Again I think that's so far distantly related. She testified that even though she was friends with some of the officer's wives, that was just - it wasn't even a thing where she went on vacation together of they went on trips, things of that sort.

(Tr. 62.)

The trial court's decisions cannot be said to be outside the bounds of its discretion. In each instance it reviewed the totality of the circumstances, the nature of the relationships, their frequency of contact, whether the relationships would cause the prospective jurors to credit one party's testimony over another. In each instance the answer militated against granting a strike for cause. Each decision was reasonable.

D. THE TRIAL COURT'S DECISION REGARDING JUROR HYRE WAS BASED UPON THE TOTALITY OF THE CIRCUMSTANCES.

1. The Standard of Review.

> In reviewing the qualifications of a jury to serve in a criminal case, we follow a three step process: Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court.

State v. Miller, 197 W. Va. 588, 600-01, 476 S.E.2d 535, 547-48 (1996).

2. Discussion.

The Appellant next contends that the trial court erred, as a matter of law, when it relied solely upon the jurors' representations and promises that they had been fair. The Appellee assumes that the Appellant is referring, once again, to the representations made by Jurors Hyre and Lane. Juror Hyre testified that she could be fair and impartial. Notwithstanding the Appellant's representations, the trial court did not solely rely upon Hyre's representations. The court reviewed the totality of the evidence adduced at the hearing. It characterized the relationship between Juror Hyre and the Appellant as not rising to the level of a mere acquaintance. It then viewed Juror Hyre's testimony within the context of this evidence, finding it credible. The court's final determination correctly applied the law, and fell well within the bounds of its discretion.

E. THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

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.

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

2. Discussion.

The Appellant next claims that the evidence adduced at trial was insufficient to support his conviction. The State introduced the testimony of Sergeant Trader of the West Virginia Department of Public Safety. Sergeant Trader went through each count of the indictment, demonstrating by the use of the Appellant's time sheets, radio logs, and CDDP forms that he falsely claimed that he was on DUI patrol when he was not. Appellant's position that the radio logs were not reliable, or that administrative time was chargeable to the grant were fully and fairly presented to the jury at trial. These positions were soundly rejected. Appellant now seeks a second opportunity to relitigate the same issues. Clearly, this is not the purpose of this appeal.

F. THE APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT RIPE FOR REVIEW.

1. The Standard of Review.

Counsel's conduct is measured under the two-part analysis outlined in *Strickland*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

> It is an extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on 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 the issue upon which to more thoroughly review an ineffective assistance of counsel claim.

Syl. pt. 10, *State v. Triplett,* 187 W. Va. 760, 762-63, 421 S.E.2d 511, 513-14 (1992).

2. <u>Discussion</u>.

The Appellant next claims that he received constitutionally ineffective assistance of counsel. Attempting to separate herself from Appellant's defense team, at least for the purposes of *voir dire,* Appellant's counsel claims that co-counsel Mike Clifford failed to preserve any objections to the jury panel, failed to move for a change of venue, failed to ask for a panel enlargement or modification. Mr. Clifford also failed to object to records allegedly obtained by the State by use of improperly issued subpoenas.

Each of these issues is one of trial strategy better left to factual development by independent defense counsel during a state habeas proceeding. Current defense counsel played a part in most of the decisions in question thus it would be improper for her to argue her own ineffectiveness. The Appellant would be best served if this matter were dealt with another day.

IV.

CONCLUSION

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

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 20th day of January, 2010, addressed as follows:

To: Barbara Harmon-Schamberger, Esq.
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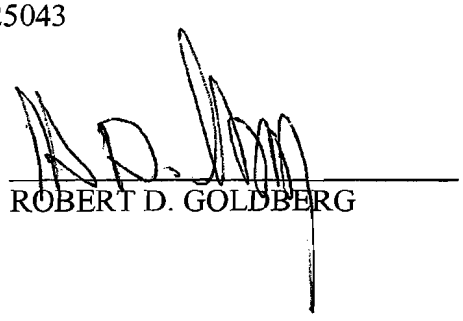

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