

NO. 35014

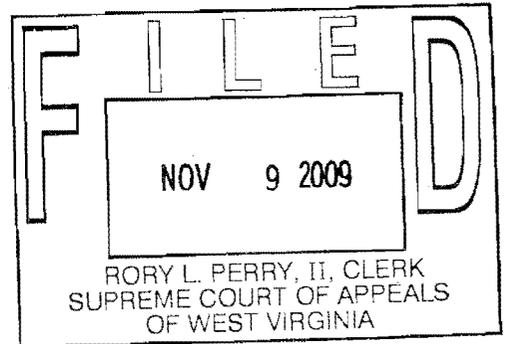
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

Charleston

State of West Virginia, Below,
Appellee

v.

Raymond Elswick, Defendant Below,
Appellant



REPLY BRIEF OF APPELLANT, RAYMOND ELSWICK

Justices:

Hon. Brent D. Benjamin, Chief Justice
Hon. Robin Jean Davis
Hon. Margaret L. Workman
Hon. Menis E. Ketchum
Hon. Thomas E. McHugh

Rory L. Perry, Clerk

Filed by Counsel, Lee F. Benford II, and Morgan B. Hayes
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Appellant

REPLY BRIEF OF APPELLANT, RAYMOND ELSWICK

COMES NOW, Raymond Elswick, Appellant, by co-counsel Lee F. Benford II and, Morgan B. Hayes in reply to the BRIEF OF APPELLEE, STATE OF WEST VIRGINIA.

This is the case involving the death of Mr. Burns after he had been caught by Crystal Hicks, mother, putting his hands up her daughter's shirt and down her pants.

A. THERE WAS A DOUBLE JEOPARDY VIOLATION IN RETRYING THE APPELLANT BECAUSE THE STATE INITIALLY PROVOKED THE MOTION FOR MISTRIAL WHEN AN EXPERIENCED AND SEASONED PROSECUTING ATTORNEY COMMENTED ON THE APPELLANT'S RIGHT TO REMAIN SILENT IN HIS FIRST TRIAL.

Prosecuting Attorney Sergent was called as a witness by the defense on the Motion to Dismiss upon the Double Jeopardy violation. Prosecutor Sergent's own sworn testimony established in the record of this case that at the time of the subject trial he had been admitted to practice law in West Virginia since 1985; that he started

handling criminal cases in May 1985 and at that time had been actively engaged in either the defense or prosecuting of criminal cases in the State of West Virginia; that during that time he had tried "multiple" criminal cases to a jury, including multiple murder cases; that he was aware that the appellant had chosen to remain silent in the subject case; that he was aware that they jury had been instructed that they were not to consider or draw any inference from the fact that the appellant had not testified; that during his closing statement to the jury he stated "I can't call Mr. Elswick as a witness, he has a right to remain silent."; and, that he agreed that the prohibition of commenting to a jury or the defendant's right to remain silent is a basic, elementary, fundamental aspect of criminal procedure.

The case of *Anderson v. State*, 645 S.E.2d 647 (Ga. 2007) decided by the Court of Appeals of Georgia is instructive and similar to the case at bar. The Georgia court held that the record showed that the state intended to goad the defendant into moving for a mistrial, and thus retrial was barred by double jeopardy where the state elicited testimony from a police officer that defendant refused to sign a waiver of his rights after his arrest. In so holding the Georgia court made the following finding:

[w]e find it impossible to believe that an error which is so blatant and so contrary to the most basic rules of prosecutorial procedure and conduct could have been simply a negligent act. To allow this prosecutor's action to be categorized as a mistake would require this Court to assume that this prosecutor was totally lacking the foundational knowledge for prosecutorial conduct in a courtroom. *Id. at p. 646.*

B. THE CIRCUIT COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS BASED UPON SPEEDY TRIAL VIOLATIONS BY RELYING ON WEST VIRGINIA CODE §62-3-21 FOR DETERMINING CONSTITUTIONAL SPEEDY TRIAL.

The Appellee makes the same mistake as the trial court in arguing its case by relying on a statutory three term rule analysis. Appellant raises a constitutional issue which cannot be trumped by a statutory enactment.

In most cases using the three-term rule statute as the tool by which to do a West Virginia Constitutional speedy trial analysis will arrive at the correct result, except in cases where the determination hinges upon the second prong of *Barker*, the cause for the delay. *W. Va. Code §62-3-21* does not meet or exceed the *Barker* standards of every prong. This is because a strict application of *W. Va. Code § 62-3-21*, without considering the constitutional requirements, will improperly attribute delay caused by the state to the defendant if the defendant is forced to request a continuance based upon State failure to provide discoverable materials timely (eg. providing discoverable material late or on the day of trial). Other jurisdictions have recognized this very problem and have addressed it in its constitutional analysis. "In attributing each period of delay, when analyzing a speedy trial claim under the . . . [State] Constitution, **a court must bear in mind that delay requested by a particular party may be attributable to the other party.**" *State v. Ariegwe*, 167 P.3d 815 (Montana, 2007) (emphasis added). And, this is precisely what occurred in the instant case. Again, the Appellant is claiming a violation to a speedy trial under the U.S. and West Virginia Constitutions.

C. THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED ON ONGOING DISCOVERY VIOLATIONS.

The Appellee states that this is not well pled and that the Appellant fails to state why continuances were not a proper remedy. However, the Appellee pleads the Appellant's case **well** by speaking out of both sides of its mouth. The Appellee states that the proper remedy for dealing with numerous and ongoing discovery violations by the State was to request a continuance. Then the Appellee in the next breath and out of a different side of its mouth states that there was no speedy trial violation because the continuance came as a result of the defendant's motion even if caused by the State.

In the instant case the lower court has already determined the reasons for the delays in its ORDER GRANTING DEFENDANT'S MOTION FOR JUDICIAL NOTICE AND DENYING MOTION TO DISMISS BASED ON PROSECUTORIAL MISCONDUCT.

Numerous delays have occurred in this case. On at least two occasions, trial was continued because of delays in forensic testing by the crime laboratory; on one occasion, trial was continued to allow for a competency evaluation of the defendant [during the 1st and uncounted term for the 3 term rule]; **the remaining occasion[s] have been due to late disclosure of discoverable information by the State, prompting motions to continue by the Defendant. On one occasion, a mistrial was declared after 4 days of jury trial.** *Prosecutorial Misconduct Order, SCR, Vol. 1, p. 608.*

D. ADDITIONAL GROUNDS

The appellant further relies on the argument and authorities cited in the initial Appellant's Brief previously filed in this action and submits that all assignments of error have been properly and adequately briefed therein.

RELIEF REQUESTED

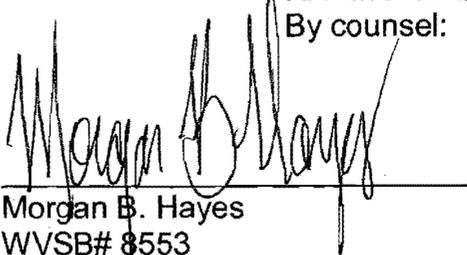
Raymond Elswick respectfully requests that his conviction and sentence be reversed and his case remanded to the circuit court with direction that an order be entered therein dismissing the indictment with prejudice.

Respectfully submitted,

RAYMOND ELSWICK,
By counsel:



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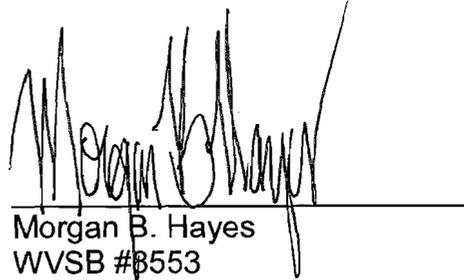
CERTIFICATE OF SERVICE

I, Lee F. Benford II, and Morgan B. Hayes, co-counsel for the defendant, Raymond Elswick, do hereby certify that we have served the foregoing REPLY BRIEF OF APPELLANT, RAYMOND ELSWICK upon R. Christopher Smith, Counsel for the Appellant, by depositing in the United States mail, first-class postage prepaid, on this the 9th day of November, 2009, addressed as follows:

R. Christopher Smith,
Counsel for the Appellant
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