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NO. 34806

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

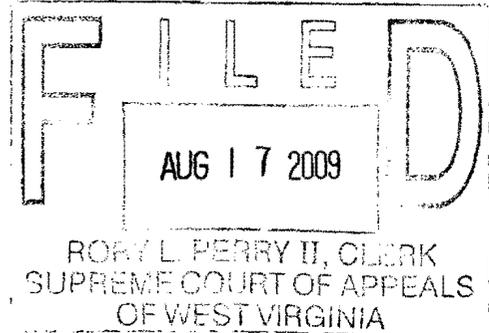
STATE OF WEST VIRGINIA

Appellee

v.

PHILLIP BARNETT and
NATHANIEL BARNETT

Appellants



APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

NOW COME Appellants, Phillip and Nathaniel Barnett, by The James Law Firm PLLC and its counsel Daniel R. James and Nicholas T. James, in reply to the brief of Appellee pursuant to Rule 10(c) of the West Virginia Rules of Appellate Procedure. Appellee's response to the assignments of error are quoted below, followed by Appellants' reply.

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND COMMIT REVERSIBLE ERROR IN DENYING APPELLANTS BEING ABLE TO PLAY THE TAPED STATEMENT OF BRIAN DEMENT TO INVESTIGATORS TO THE JURY. MR. DEMENT HAD REPEATEDLY ADMITTED HE HAD LIED IN THESE STATEMENTS WHEN IMPEACHED BY APPELLANTS' RESPECTIVE COUNSEL, AND PLAYING THESE TAPES FOR THE JURY WOULD HAVE BEEN CUMULATIVE

Mr. Dement gave three statements to the West Virginia State Police in January of 2007 immediately after he ingested drugs and alcohol and was interrogated for over nine hours. Mr. Dement's statements implicated the Appellants and codefendant Justin Black in the death of Ms. Crawford in 2002. Mr. Dement was the State's star witness at trial as he was the only geographical link of the Appellants to where Ms. Crawford's body was located on Hickory Ridge. After his guilty plea to second degree murder and a separate but unrelated malicious wounding, Mr. Dement gave two separate audio recorded statements to private investigators Greg Cook and Danny Lane that were diametrically opposed to his prior statements. In both statements to Cook and Lane, Mr. Dement exonerated the Appellants. It is the lower court's denial of Mr. Dement's prior inconsistent audio recorded statements at trial for impeachment purposes that is the subject of this first assignment of error.

As a starting point, it is important to note that in the companion case of *State v. Justin Keith Black*, each juror was given a copy of the transcript and audio recording of Mr. Dement's two prior inconsistent statements. Appellee argues that it was not reversible error to deny the

jury the opportunity to listen to the taped statements from the State's star witness Brian Dement on essentially two grounds. First, the Appellee notes that the lower court's ruling denying Appellants' motion to play the Dement tapes is not fully articulated. As such, the Appellee attempts to clarify all ambiguity in the trial court's ruling by arguing that "in light of the ample opportunity to impeach and the admission of prior dishonesty the ruling to deny the taped statements being played for the jury could have been on the basis of the West Virginia Rule of Evidence 403." *W.Va. R. Evid. 403* More specifically, the Appellee argues the playing of the tapes would cause *undue delay, waste of time, or needless presentation of cumulative evidence. Id.*

The pure sophistry of this position is that the Appellee fails to consider in its analysis that the Appellants were not on trial for a simple misdemeanor offense or traffic violation where the punishment may include a small fine, and regular court costs. The Appellants were tried for murder years after the death of the victim! Furthermore, the witness sought to be impeached with extrinsic evidence was the State's star witness. It was absolutely essential to fundamental fairness and due process to impeach Mr. Dement with the Lane and Cook audio recorded statements not only due to the fact that the statements were inconsistent with his in court testimony, but due to the fact that his prior inconsistent statements exonerated the Appellants. Combined, the Cook and Lane audio recorded tapes are only forty-one minutes in duration. Given the significance of the joint murder trial, the huge stakes at risk, and the importance of impeaching the prosecution's star witness, it is clear that an additional forty-one minutes of trial would not have caused undue delay as argued by the Appellee. After all, the joint trial, including jury selection, was over in just two and one-half days.

Second, Appellee argues that the trial court properly excluded Mr. Dement's prior inconsistent audio recordings under Rule 613(b). In *State v. Blake*, this Court held three requirements must be satisfied before admission at trial of a prior inconsistent statement made by a witness, *to-wit*;

(1) the statement actually must be inconsistent (but there is no requirement that the statement be diametrically opposed),

(2) **if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached**, the area of impeachment must pertain to a matter of sufficient relevancy **and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence, notice and an opportunity to explain or deny, must be met**, and

(3) the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact. 197 W.Va. 700 (1996).

Appellee argues that Mr. Dement was extensively impeached with prior inconsistent statements during oral cross-examination and therefore the trial court correctly disallowed the audiotapes as extrinsic evidence. Appellee's argument is too simplistic and an incorrect application of the law. According to the Appellee, once a witness is impeached with a prior inconsistent statement during oral cross-examination, counsel is forever barred from impeaching a witness with extrinsic evidence of a prior inconsistent statement. Appellee fails to consider that impeachment of a witness with a prior inconsistent statement can come in the form of oral cross-examination or in the form of extrinsic evidence. Extrinsic evidence entails either calling a third party to testify to the existence and content of the prior inconsistent statement or presenting some documentary or recorded form of the statement. *State v. King*, 183 W.Va. 440 (1990),

Franklin D. Cleckly, Handbook on Evidence for West Virginia Lawyers, § 4.2(B), at 159 (2d ed. 1986) Unlike oral cross-examination, extrinsic evidence requires two prerequisites that must be satisfied, notice and opportunity to explain or deny. *W.Va. R. Evid.* 613(b).

In the case *sub judice*, counsel for the Appellants opted to use both oral and extrinsic evidence of prior inconsistent statements to impeach Mr. Dement due to the significance of his testimony. Impeachment of Mr. Dement with extrinsic evidence of his tape recorded statements was impermissibly denied in contradiction to *Blake* and Rule 613(b) as all prerequisites were satisfied.

As it relates to the notice requirement, this Honorable court stated while a specific foundation need not initially be made to impeach a witness with a prior inconsistent statement, “a witness must be informed of the general nature of his prior inconsistent statement ...” *State v. Moore*, 189 W.Va. 16 (1992) Clearly, Mr. Dement was informed of the general nature of his prior inconsistent statements during cross-examination. As it relates to the requirement of opportunity to explain or deny, Mr. Dement explained the prior inconsistent statement at trial by stating that although he told partial lies and truths, he was **testifying truthfully at trial**. [Trial Transcript 449] As stated by this Court, “[t]he relevant consideration under Rule 613(b) provides for the admission of a ... statement which is inconsistent with the witness’ **in court testimony**.” *State v. Rodoussakis*, 204 W.Va. 58 (1998) Having satisfied all Rule 613(b) requirements, it was error for the lower court to deny impeachment of Mr. Dement with extrinsic evidence to challenge his present testimony at trial.

B. ALTHOUGH NO INSTRUCTION WAS GIVEN BY THE CIRCUIT COURT REGARDING BRIAN DEMENT'S PLEA AGREEMENT THAT IT WAS NOT FOR THE PURPOSE OF PROVING APPELLANTS' GUILT, NO DISCUSSION OR REQUEST FOR THIS OCCURRED DURING THE PERIOD OF INSTRUCTIONS BEING WORKED OUT WITH THE PARTIES, AND APPELLANTS WAIVED THIS RIGHT

In its brief, Appellee does not dispute that it is reversible error where no *Caudill* cautionary jury instruction is given that a plea agreement by a co-defendant is not to be used to prove the guilt of a defendant in a case. However, Appellee argues that “there was absolutely no discussion or request for such an instruction and no objection raised due to its absence. In light of this, Appellants’ waived any right to have their conviction reversed on this ground.”

The Appellee would like to lead this Honorable Court into thinking that there was “absolutely no discussion” for such an instruction. During the instruction arguments at the close of the evidence the Court struck from the charge to the jury the following language requested by defense counsel, *to-wit*; “[d]efendants are defending upon the basis that they did not commit the crime, and that the testimony of Brian Dement is false and given to obtain a lesser punishment.” Admittedly, counsel below did not elucidate the precepts of the *Caudill* instruction with the eloquence of Felix Frankfurter, nonetheless the request for the inclusion of the omitted language in the jury instructions sufficiently raised the issue with the lower court.

Assuming *arguendo*, that Appellants’ counsel failed to raise the issue of the *Caudill* cautionary instruction below, the requirement of raising an objection to preserve the argument for appeal is moot should this Court find “plain error.” More specifically, Rule 30 of the West Virginia Rules of Criminal Procedure states,

[n]o party may assign as error the giving or the refusal to give an instruction or the giving of any portion of the charge unless that party objects thereto before the arguments to the jury are begun, stating distinctly the matter to which that party objects and the grounds of the objection; but the court or **any appellate court may, in the interest of justice, notice plain error in**

the giving or refusal to give an instruction, whether or not it has been made the subject of objection *W.Va. R. Crim. P. 30*

In addition, Rule 52 of the West Virginia Rules of Criminal Procedure states, “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” *W.Va. R. Crim. P. 52*

In criminal cases, plain error is error which is so conspicuous that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting the error. *State v. Marple*, 197 W.Va. 47 (1996) To trigger application of the “plain error” doctrine, there must be an error that is plain, that affects substantial rights, and seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *State v. Miller*, 194 W.Va. 3 (1995)

Under the first factor, it is clear that it was error for the trial court to not give the *Caudill* instruction. See *State v. Caudill*, 170 W.Va. 74 (1982), *United States v. Aronson*, 319 F.2d 48 (1963)

Under the second factor, the error is plain or, in other words, clear or obvious. It is uncontested by the Appellee that the trial court did not give the cautionary instruction as required in *Caudill*. Appellee only argues that Appellants' waived any right to have their convictions reversed on this ground due the absence of any objection or discussion regarding the issue below. *Caudill* states that the failure by a trial judge to *sua sponte* give a cautionary jury instruction is reversible error. *Caudill* at 82

The third factor requires this Court to determine whether the trial court's failure to give the *Caudill* cautionary jury instruction affected the substantial rights of the Appellants. “[T]his requirement means that the error must result in prejudice to the defendant. The defendant bears the burden of persuasion on this issue.” *State v. Lightner*, 205 W.Va. 657 at 662 (1999) In

other words, this Court must ask whether the error affected the outcome of the proceedings in the trial court. *See State v. Miller*, 194 W.Va. 3 at 18 (1995) Unless there is a reasonable possibility that the trial court's failure to give the *Caudill* cautionary jury instruction caused the jury to convict rather than acquit, the convictions will stand. *See State v. Lightner*, 205 W.Va.657 (1999)

In the instant case, there is a "reasonable possibility" that the trial court's failure to give the *Caudill* cautionary jury instruction caused the jury to convict the Appellants rather than acquit. Appellants submit to this Honorable Court that it was not fortuitous that they were found guilty of second degree murder after the jury heard Mr. Dement entered a plea to second degree murder. In fact, in the companion case of *State v. Black* the jury was not given a *Caudill* cautionary instruction and found Mr. Black guilty of second degree murder. Under the circumstances, there is a "reasonable possibility" that the jury used the plea agreement of Mr. Dement not to the issue of witness credibility, but for the purpose of finding the Appellants' guilt to the same offense by misinterpreting the purpose for which his testimony was offered.

C. WHEN THE ENTIRE VOIR DIRE QUESTIONING OF JUROR STATEN IS EXAMINED, SHE SHOWED NO SIGN OF BIAS AND COULD MAKE DECISIONS ACCORDINGLY. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO STRIKE HER FOR CAUSE

This Honorable Court recently held, "the object of the laws is, in all cases in which juries are impaneled to try the issues, to secure persons for that responsible duty whose minds are **wholly free from bias or prejudice** either for or against the accused." *State v. Newcomb*, WL 1835022 (2009) In another case, this Honorable Court stated, "the essence of the jury voir dire process is to secure jurors who are not only free from prejudice, **but who are also free from the suspicion of prejudice.**" *State v. West*, 157 W.Va. 209 (1973) "When considering whether to excuse a prospective juror for cause, a trial court is required to consider the "totality of the

circumstances” and “to resolve any doubts in favor of excusing the juror.” *State v. Newcomb*, WL 1835022 (2009)

During voir dire, juror Staten stated she was a friend and acquaintance of Trooper Losh’s wife, an officer directly involved in the underlying death investigation. Juror Staten further disclosed that she had followed the case for six years and read newspaper articles when they were published, knew the two co-defendants were guilty, and followed the case with attention because her sister lives in Lincoln County, and the victim’s body was found close to Salt Rock. When asked whether the convictions of Mr. Dement and Mr. Black would make it more likely to find the Appellants guilty, juror Staten replied “I don’t fell it will.” Juror Staten clearly expressed a degree of doubt as her response was not an unequivocal “absolutely not.” This Honorable Court held that a prospective juror’s “mind must be in condition to enable him to say on his voir dire **unequivocally and without hesitation** that [any formed] opinion will not affect his judgment in arriving at a just verdict from the evidence alone submitted to the jury on the trial of the case.” *State v. Gargiliana*, 138 W.Va. 376 (1953)

Under the totality of the circumstances, there is certainly doubt or suspicion of prejudice as to whether juror Staten was “wholly free from bias or prejudice.” The facts on the record are to the contrary to any arguments made by Appellee that juror Staten could impartially judge the guilt or innocence of the Appellants. Having failed to resolve any doubts in favor of excusing juror Staten, the trial court committed reversible error.

D. THE CIRCUIT COURT PROPERLY APPLIED WEST VIRGINIA CODE § 62-3-8 IN ASSIGNING PEREMPTORY CHALLENGES WHERE APPELLANTS WERE JOINTLY TRIED FOR THE MURDER OF THE VICTIM

The right of a defendant to exercise his or her peremptory challenges is such an important right, this Court has held that if the court fails to remove just one juror for cause and the

defendant subsequently has to waste a peremptory challenge, reversible error results. *State v. Phillips*, 194 W.Va. 569 (1995) As in the present case, where there are multiple defendants being tried for a felony case, codefendants “shall be allowed to strike from the panel of jurors not more than six thereof, and **only such as they all agree upon** shall be stricken therefrom.” W.Va. Code § 62-3-8 Here, however, the court split the six peremptory strikes and the Appellants’ **independently** exercised only three peremptory challenges in direct violation of the clear language in W.Va. Code § 62-3-8.

Given the fact that peremptory challenges are one of the most important rights secured to the accused, it was reversible error for the court to limit each Appellant to independently exercise just three peremptory strikes. The only way to cure the trial courts error was to allow each Appellant to independently exercise three additional strikes pursuant to *W. Va. R. Crim. P.* 24(b)(2)(B). Had this simple course of action been followed, the Appellants would have been in the same position had they opted to be tried separately or had the trial court properly followed W.Va. Code § 62-3-8 by requiring the Appellants to exercise all six strikes jointly. *See* W.Va. Code § 62-3-3 (in a felony case a single defendant is entitled to six peremptory challenges.)

E. THERE WAS NO SPEEDY TRIAL VIOLATION REGARDING APPELLANTS’ CASE. THE CIRCUIT COURT FOUND GOOD CAUSE FOR A CONTINUANCE MOTION TO BE GRANTED, THE ONE-TERM RULE WAS NOT VIOLATED AND NO PREJUDICE OCCURRED

The right to a speedy trial is a fundamental right and is obligatory. In *Barker v. Wingo*, the United States Supreme Court stated the following four factors must be examined in deciding whether an accused has been denied his or her constitutional speedy trial right, *to-wit*; the length of the delay, the reason for the delay, the accused's assertion of his or her speedy trial right, and the prejudice to the accused. 407 U.S. 514 (1972) The Supreme Court stated, “[n]one of these

factors has a talismanic quality, and each, and other pertinent factors, must be weighed in a difficult and sensitive balancing process.” *Id.*

In addressing the first factor, the delay is measured from the time the defendant is formally accused or arrested. *United States v. Marion*, 404 U.S. 307 (1971) No specific length of delay automatically constitutes a violation of the right to speedy trial. *Id.* In the instant case, Appellants were indicted on May 11, 2007, and were not tried until August 25, 2008, despite the fact that the trial was originally scheduled for September 4, 2007. The delay of about one year and three months is sufficient to invoke speedy trial considerations.

In regards to the reason for the delay, it is important to note that the delay was a prosecutorial delay, rather than a delay in the judicial process as a whole or by the Appellants. Based upon the scintilla of inculpatory evidence the State had against the Appellants’ it was absolutely necessary to elicit testimony from Mr. Dement. Without Mr. Dement’s testimony the State had no case against the Appellants. The only way to obtain testimony from Mr. Dement was for the State to continue the Appellants’ trial and attempt to strike a plea agreement with Mr. Dement in exchange for his testimony. On August 29, 2007, the prosecuting attorney moved the court for a continuance. In addressing the State’s motion, the court stated, “I am not finding good cause for this continuance...” [August 29, 2007 Motion Hearing Transcript at 23] Inexplicably, and without a just explanation, the Court changed its mind at a later hearing and found good cause for the continuance despite the fact that nothing new developed. As planned, less than two months later Mr. Dement entered into a plea agreement in exchange for his testimony against the Appellants. Under the current set of facts it is not hard to surmise that there was collusion behind the scenes to delay the Appellants’ trial in order to give the State a tactical advantage.

In addressing the third factor, during every term of court the case was active Appellants filed timely requests for a “speedy trial.”

In considering the prejudice factor, the reviewing court will not require proof of actual prejudice, but only some showing that the delay has been prejudicial. *Phillips v. States*, 650 S.W.2d 396, 401 (1983) The speedy trial guarantee is designed to minimize or reduce the impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges. *Barker v. Wingo*, 407 U.S. 514 (1972) In the case *sub judice*, the Appellants liberty was seriously interfered with despite the fact that they remained on bail. The Appellants financial resources were drained, they and their family suffered from a prolonged year and three months of anxiety, and their liberties were substantially deprived. Appellants do not solely rely on the fact that the additional passage of time made proof of any fact more difficult, as the Sixth Amendment right to a speedy trial is not primarily intended to prevent prejudice to the defense caused by passage of time. That interest is protected primarily by the Due Process Clause and by statutes of limitations. However, Appellants’ will note that it is difficult to imagine that that no prejudice to Appellants’ defense resulted from the fifteen month delay.

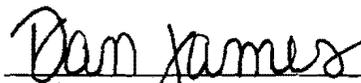
In balancing the four factors discussed in *Barker v. Wingo*, of significance and deserving great weight is the Appellants’ persistence of their right to obtain a speedy trial and being thwarted, the fifteen month delay attributable to the prosecution to obtain testimony from Mr. Dement against the Appellants, and a questionable ruling by the lower court reversing its prior finding that there was no good cause shown by the State for a continuance. In addition, the protections and considerations of the constitutional right to a speedy trial are strongly implicated in the instant case. To hold, as the Appellee would have this court hold, that Appellants had not

been deprived of their right to a speedy trial would be to deny that aspect of the Sixth Amendment any vitality. In considering the four *Barker* factors, and the constitutional sanctity at issue, the scale tips in favor of Appellants.

PRAYER FOR RELIEF

WHEREFORE, the Appellants, Phillip and Nathaniel Barnett, respectfully request that their convictions be reversed, or in the alternative grant a new trial.

**PHILLIP BARNET
NATHANIEL BARNETT
BY COUNSEL**

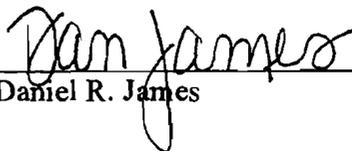


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellants hereby certifies that a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** was mailed to counsel for the Appellee by depositing it in the United States mail, first-class postage prepaid, on this the 14th day of August, 2009, addressed as follows:

R. Christopher Smith
Assistant Attorney General
State Capitol, Room E-26
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Daniel R. James