
NO. 35276

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

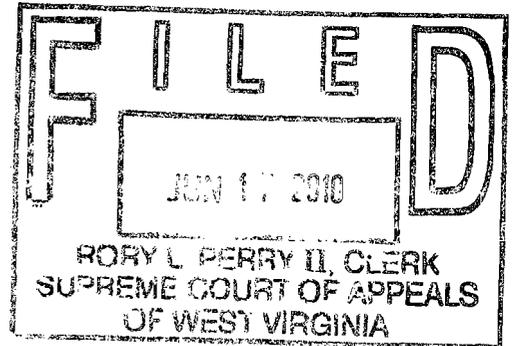
STATE OF WEST VIRGINIA,

Appellee,

v.

MARK WILSON,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

**KIND OF PROCEEDING
AND RULING OF LOWER TRIBUNAL**

This case is before the Court pursuant to Mark Wilson's ("Appellant") appeal from his conviction in the Circuit Court ("court") of Braxton County of conspiracy to deliver a controlled substance. On appeal, Appellant asserts that the court erred in allowing the State to use certain witnesses at trial that were not timely disclosed. Appellant further asserts that the court improperly sentenced him. The State disagrees.

II.

STATEMENT OF FACTS

On September 5, 2007, Appellant contacted Emma Butcher, a confidential informant ("CI"),

and indicated that he had some morphine pills for sale.¹ Tr. 122. Following this conversation, the CI contacted the West Virginia State Police (“police”).² Tr. 96, 97, 122. The police informed the CI that they wanted her to purchase the morphine pills from Appellant. Tr. 122, 123. The police met with and gave the CI \$200.00 to buy the pills. Tr. 97, 98, 123. The CI then contacted Appellant and they agreed to meet each other at another location. Tr. 123. The police then transported the CI to this location where she was equipped with a hidden tape recorder to record the transaction between her and Appellant. Tr. 98.

Thereafter, Appellant and the CI met at the agreed upon location to finalize the transaction. Tr. 99, 123. Appellant was accompanied by Sam Veasey (“codefendant”).³ Tr. 123, 133, 134. The CI handed the codefendant \$200.00, which the codefendant turned over to Appellant. Appellant then handed the morphine pills to the codefendant who, in turn, gave the pills to the CI. Tr. 123, 128, 135.⁴

On January 11, 2008, a criminal complaint was filed in the Magistrate Court of Braxton County charging Appellant with delivery of a controlled substance and conspiracy to deliver a controlled substance. R. at 8. The criminal complaint indicates that Appellant and the codefendant traveled to the CI’s residence and sold her four morphine pills for \$200.00. *Id.* at 8-9. The criminal

¹ Appellant did not know that Ms. Butcher was a CI at the time, although they had known each other for several years. Tr. 121.

² The CI actually contacted Trooper Jason Drake and/or Trooper John Bonazzo. Tr. 122.

³ Danny McKnight was also in the car with Appellant and the codefendant. Tr. 134. However, Mr. McKnight had no involvement in the transaction.

⁴ Following this transaction, the CI gave the pills to the police who submitted them to the West Virginia State Police Laboratory for analysis, where they were confirmed as containing morphine. Tr. 100, 117.

complaint further indicates that the codefendant gave a statement to the police on January 10, 2008, during which the codefendant indicated that he and Appellant “were involved in a drug transaction” in which he and Appellant “exchanged three (3) or four (4)” “morphine pill[s], for around \$200.00.” *Id.* at 9.

On June 24, 2008, the Grand Jury for Braxton County returned a two count indictment against Appellant and the codefendant for delivery of a controlled substance and conspiracy to deliver a controlled substance. R. at 1, 2.

On June 26, 2008, the prosecution served Appellant’s counsel with the police report as well as its first witness list. R. at 41, 42, 45. This witness list included Troopers Drake and Bonazzo of the West Virginia State Police, as well as Carrie Kirkpatrick, a forensic chemist with the State Police Laboratory. *Id.* at 42. “[T]he police report is riddled with references to the confidential informant . . . about what the confidential informant did, how the confidential informant was searched, what vehicle the confidential informant saw, where they [Appellant and the CI] met” 10/15/2008 Suppression Hr’g at 5.⁵

On July 16, 2008, the court arraigned Appellant. R. at 67. The court scheduled the case for trial on October 15, 2008. *Id.* at 68. The court further ordered that the prosecution provide Appellant with discovery by July 23, 2008. *Id.*⁶ The court also ordered that the parties exchange their witness lists by October 1, 2008. *Id.* at 69.

Also on July 16, 2008, Appellant filed with the court and served the prosecution with his

⁵ See *Id.* at 6 (Appellant’s counsel admitted that the police report “certainly does make lots of references to a confidential informant.”).

⁶ The court actually ordered the prosecution to provide Appellant with discovery within seven days of the arraignment hearing, which took place on July 16, 2008. *Id.* at 67, 68.

Omnibus Discovery Motion. *See generally* R. at 48-60. In request #8 of this Motion, Appellant requested that the prosecution furnish him with the names of all witnesses it intended to call to testify at trial. *Id.* at 50. In request #32, Appellant requested that the prosecution disclose the identity of any informant that it intended to call to testify. *Id.* at 58.

On July 17, 2008, the prosecution filed with the court and served Appellant's counsel with its Reply to Appellant's Omnibus Discovery Motion. *See generally* R. at 61-66. In response to request #8 of Appellant's Motion, the prosecution referred Appellant to the State's witness list that was previously provided to him on June 26, 2008. *Id.* at 62. In response to request #32, the prosecution indicated that it was declining to reveal the identity of the CI until plea negotiations had terminated.⁷ *Id.* at 64-65.

On August 1, 2008, the prosecution served Appellant's counsel with the tape recording of the controlled buy between Appellant and the CI. R. at 70-71. Appellant's first counsel⁸ had an opportunity to listen to this recording in the prosecutor's⁹ office. 10/15/2008 Suppression Hr'g at 5. Afterward, the prosecutor, Appellant's counsel and Appellant had a discussion in the hallway outside of the prosecutor's office. *Id.* During this discussion, Appellant's counsel asked the prosecutor when he intended to reveal the identity of the CI, to which the prosecutor indicated that the CI's identity would be disclosed immediately following all plea negotiations. *Id.* At this

⁷ The prosecution's refusal to identify the CI until plea negotiations had ceased was done to protect the CI. Had Appellant entered into a plea agreement, it would have been unnecessary to risk the CI's protection by revealing her identity.

⁸ Appellant's first counsel was Bryan Hinkle, who was appointed to represent Appellant on January 13, 2008. *Id.* at 14.

⁹ The prosecutor was Daniel Dotson. 10/15/2008 Suppression Hr'g at 5.

moment, Appellant looked directly at the prosecutor and stated “I know it’s Emma Butcher.” *Id.* The prosecutor responded by stating “Mr. Wilson, that’s a very good guess.” *Id.*

Appellant’s second counsel¹⁰ also had an opportunity to listen to the recording of the controlled buy. 10/14/2008 Suppression Hr’g at 7. The recording had a female voice on it, which Appellant’s counsel “presume[d] . . . to be the confidential informant.” *Id.* at 8.

On September 8, 2008, the parties appeared in the court for a docket call, during which time they informed the court that they had not reached a plea agreement. R. at 72. The court then ordered that the trial remain scheduled for October 15, 2008. *Id.*

On or about October 9, 2008, the codefendant, Sam Veasey, pled guilty. 10/14/2008 Suppression Hr’g at 19; 10/15/2008 Suppression Hr’g at 6.

On October 9, 2008, the prosecution served Appellant’s counsel with its supplemental witness list, which identified the CI, Emma Butcher, as well as the codefendant, Sam Veasey, as witnesses for the prosecution. R. at 74, 75.

Following this disclosure, on October 10, 2008, Appellant moved the court to suppress/exclude the testimony of the CI and codefendant.¹¹ *See generally* R. at 79-81. At no time prior to filing his Motion to Suppress/Exclude did Appellant move the court to compel disclosure of the CI and codefendant. 10/14/2008 Suppression Hr’g at 15-16; 10/15/2008 Suppression Hr’g at 4, 7, 10, 17.

On October 14 and 15, 2008, suppression hearings were held in the court to address

¹⁰ Appellant’s second counsel was Daniel Grindo, who replaced Bryan Hinkle as appointed counsel for Appellant on October 1, 2008. R. at 73.

¹¹ Thereafter, on October 14, 2008, the prosecution responded to Appellant’s Motion to Suppress/Exclude these witnesses. *See generally* R. at 83-84.

Appellant's Motion to Suppress/Exclude the CI and codefendant from testifying for the prosecution. During these hearings, the court denied Appellant's Motion and ordered that the CI and codefendant would be permitted to testify. 10/14/2008 Suppression Hr'g at 13; 10/15/2008 Suppression Hr'g at 6, 11. The court further ordered that Appellant's counsel be permitted to interview the CI prior to trial. 10/15/2008 Suppression Hr'g at 19-20.

Following his trial on October 15, 2008, the jury convicted Appellant of conspiracy to deliver a controlled substance. Tr. 180; R. at 100.¹²

On October 16, 2008, the prosecution filed a Recidivist Information with the court charging that Appellant was subject to sentencing under the recidivist statute.¹³ *See generally* R. at 167-168. Thereafter, Appellant pled guilty to the Recidivist Information. *Id.* at 149.

On February 13, 2009, based upon his conviction for conspiracy to deliver a controlled substance, the court sentenced Appellant to one to five years in the penitentiary. R. at 151. Based upon his conviction of the Recidivist Information, as well as his plea agreement with the prosecution,¹⁴ the court sentenced Appellant to an additional five years on top of the minimum one-year sentence of the underlying conspiracy conviction, for a total sentence of not less than six years. *Id.* Thereafter, Appellant brought the current appeal.

¹² The jury acquitted Appellant of the charge of delivery of a controlled substance. Tr. 180; R. at 99.

¹³ The Recidivist Information was based upon Appellant's prior felony convictions for grand larceny and possession of a firearm. R. at 167.

¹⁴ The plea agreement entered into by Appellant and the prosecution included Appellant's stipulation to the prior offenses as charged in the Recidivist Information and the prosecution's agreement to make a nonbinding recommendation to the Court that Appellant be sentenced to a minimum of five years. *Id.* at 148.

III.

ASSIGNMENTS OF ERROR

On appeal, Appellant makes the following assignments of error:

1. That the Court erred in allowing the State to use witnesses that it had not disclosed pursuant to the scheduling Order and were not disclosed until the eve of the trial.
2. That the Court erred in sentencing the Defendant using the determinate sentence enhancement instead of the indeterminate sentence enhancement.

Appellant's Brief at 3.¹⁵

IV.

ARGUMENT

A. CIRCUIT COURT COMMITTED NO ERROR IN ALLOWING CONFIDENTIAL INFORMANT BUTCHER AND CODEFENDANT VEASEY TO TESTIFY

1. Standard of Review

“The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. pt. 3, *State v. Oldaker*, 172 W. Va. 258, 304 S.E.2d 843 (1983) (quoting Syl. pt. 5, *Casto v. Martin*, 159 W. Va. 761, 230 S.E.2d 722 (1976)).

On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at

¹⁵ Please note that rather than filing a final brief, Appellant, by letter of April 27, 2010, notified the Court to accept his Petition for Appeal as his final brief. Thus, hereafter, any references to Appellant's Brief are actually references to his Petition for Appeal.

least in part, on determinations of witness credibility are accorded great deference.

Syl. pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994).

“The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant’s case.”

Syl. pt. 1, *State v. Atkins*, 223 W. Va. 838, 679 S.E.2d 670 (2009) (per curiam) (*quoting* Syl. pt. 2, *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 454 S.E.2d 427 (1994)). ““The resolution of the disclosure issue shall rest within the sound discretion of the trial court, and only an abuse of discretion will result in reversal.”” Syl. pt. 1, in part, *State v. Green*, 187 W. Va. 43, 415 S.E.2d 449 (1992) (per curiam) (*quoting* Syl. pt. 3, *State v. Tamez*, 169 W. Va. 382, 290 S.E.2d 14 (1982)).

“[I]f a party fails to comply with the discovery rules, the circuit court has general authority to enter whatever order he deems necessary under the circumstances.” *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 138, 454 S.E.2d 427, 432 (1994). “Clearly, the extent and scope of pretrial discovery is within the circuit court’s discretion, and we will not disturb a circuit court’s ruling unless there is a clear abuse of discretion.” *Id.*, 193 W. Va. 142, 454 S.E.2d 436 (*citing State v. Lassiter*, 177 W. Va. 499, 354 S.E.2d 595 (1987); *State v. Audia*, 171 W. Va. 568, 301 S.E.2d 199 (1983) *cert. denied*, 464 U.S. 934 (1983)).

2. Confidential Informant Butcher

On appeal, Appellant asserts that the prosecution failed to disclose the identity of the CI and codefendant as witnesses until the “eve of trial [October 9, 2008]” and that this late disclosure was “prejudicial” in that it made his preparation for trial “[on October 15, 2008] impossible.”

Appellant's Brief at 6. However, Appellant fails to mention that he already knew the identity of the CI well before the prosecution disclosed such on October 9, 2008. In fact, at least as far back as August 2008, Appellant admitted as much. This occurred outside of the prosecutor's office when, in the presence of the prosecutor and his counsel, Appellant stated that he knew the identity of the CI – "I know it's Emma Butcher." Thus, the Court did not commit error in allowing the CI to testify for the prosecution, as Appellant was already aware of the CI's identity long before his trial on October 15, 2008.¹⁶ "Where the government has an obligation to identify its undercover informant or agent, its failure to do so will not ordinarily be error if the defense was already aware of the informant's identity." Syl. pt. 4, *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983) (quoting Syl. pt. 2, *State v. Haverty*, 165 W. Va. 164, 267 S.E.2d 727 (1980)).

Furthermore, the tape recording of the controlled buy that was provided to Appellant and his first counsel on August 1, 2008, could have only had four voices on it, only one of which was the female voice of the CI, as the only persons present during the transaction on September 5, 2007, included Appellant (Mark Wilson), the codefendant (Sam Veasey), another uninvolved passenger in the car (Danny McKnight), and the CI (Emma Butcher). Obviously, Appellant could have easily

¹⁶ So too was the finding of the court:

[T]he defendant, . . . [in] the presence of his former counsel, Mr. Hinkle, stated in the presence of the prosecutor, "Well, I know who the CI is. The CI's identity, you don't have to disclose it because I know it, that it's Emma Butcher." And if that is the case then the defendant had knowledge of the identity of the CI. And you go back then, to the other case that I cited, the *State versus Zaccagnini*, 308 S.E.2d 131, which I looked and it's clear; I read it. And if the defendant was aware of the CI's identity and the State didn't disclose it, there's no error under that case.

deduced that the female voice on the recording was Emma Butcher and not any of the other male voices on the tape, such as Appellant, the codefendant or Mr. McKnight.¹⁷ Appellant's second counsel also had an opportunity to listen to the recording of the transaction and "presume[d] [the female voice on the tape] . . . to be the confidential informant." 10/14/2008 Suppression Hr'g at 8.

Additionally, the prosecution provided Appellant and his first counsel with the police report as far back as June 26, 2008. This police report is replete with references to the CI, including what the CI did to set up the September 5, 2007 transaction, a description of the vehicle occupied by Appellant and the codefendant at the moment of the transaction, as well as the location where the CI and Appellant met to carry out the transaction. Even Appellant's second counsel noted that "the police report . . . certainly does make lots of references to a confidential informant." 10/15/2008 Suppression Hr'g at 6. Again, from this, Appellant could have easily deduced the identity of the CI as being Emma Butcher.

"When a trial court grants a pretrial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case."

Syl. pt. 6, in part, *State v. Green*, 187 W. Va. 43, 415 S.E.2d 449 (1992) (per curiam) (*quoting* Syl. pt. 2, *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987)). Here, well before the prosecution disclosed the CI as one of its witnesses, Appellant knew the identity of the CI. As such, the prosecution's identification of the CI on October 9, 2008, was no surprise to Appellant; nor did this

¹⁷ The court likewise found that "the tape . . . that was provided had a female voice on it [and] [o]bviously it was a female voice, the defendant could deduce that it wasn't Mr. Veasey and it wasn't the defendant in the matter." 10/15/2008 Suppression Hr'g at 10-11.

October 9, 2008 disclosure hamper Appellant in preparing for his trial on October 15, 2008.

Finally, as correctly pointed out by the court, Appellant had a duty, which he failed to fulfill, to compel disclosure of the CI.¹⁸

3. Codefendant Veasey

Again, well before his trial on October 15, 2008, Appellant was on notice that the codefendant was a potential witness for the prosecution. This notice came as early as June 26, 2008, when Appellant and the codefendant were jointly indicted. As with most cases, and this case is no exception, where there are two or more defendants, there is a possibility, or more likely a certainty, that one or more of the defendants will plead guilty and agree to testify for the State.¹⁹ Even

¹⁸ In this regard, the court made the following remarks:

It appears to me that if the defendant desired the identification of the CI at that point the defendant could have filed a motion to compel the Court order the State to provide the information in the matter, and I don't see that that ever occurred.

10/14/2008 Suppression Hr'g at 15-16.

Clearly, if the defendant had filed a motion to compel, the Court would've had the opportunity to address that motion. Then, in all likelihood, the Court would've ordered the State to disclose that witness in advance[.]

10/15/2008 Suppression Hr'g at 7.

Well, of course, I can appreciate that, but at the same time if counsel feels that they haven't gotten discovery, and I know that you've come into this case just lately, but counsel has a duty to file a motion to compel.

10/15/2008 Suppression Hr'g at 17.

¹⁹ This was also the finding of the court:

[A]s far as the codefendant, I'm not going to preclude the State from calling the codefendant, because the codefendant, everybody knows who that was, it's in the indictment. It's a joint indictment. And there's always the potential, when you

Appellant's second counsel recognizes that this is often the case -- "And Mr. Veasey [codefendant], you know, I lump that into my argument to try to go for the homerun shot, to be perfectly honest, Judge. But, you know, having a codefendant turn tail on you at the last minute is not unexpected."

10/14/ 2008 Suppression Hr'g at 18.

Because he was jointly indicted with the codefendant, Appellant knew, or at the very least should have known, that the codefendant might plead guilty and be called by the prosecution to testify against him.²⁰ Furthermore, it was impossible for the prosecution to disclose the codefendant as one of its witnesses any sooner than it did -- October 9, 2008. It was not until this date that the codefendant pled guilty. Immediately thereafter, on the same day, October 9, 2008, the prosecution informed Appellant that it intended to call the codefendant to testify on its behalf. Thus, the prosecution disclosed the codefendant as its witness at the soonest possible date, and Appellant's preparation for trial was not unduly prejudiced by this disclosure, as he was already on notice, by virtue of the indictment, long before the disclosure.

"Where the State is unaware until the time of trial of material evidence which it would be required to disclose under a Rule 16 discovery request, the State may use the evidence at trial provided that: (1) the State discloses the information to the defense as soon as

have two defendants or multiple defendants, that one of them is going to strike a deal and you're placed on notice of that.

10/14/2008 Suppression Hr'g at 13.

²⁰ Additionally, the record reflects that the codefendant was a potential witness for the prosecution even before the Grand Jury returned an indictment in this case. On January 11, 2008, a criminal complaint was filed charging Appellant with the offenses that he would be eventually indicted. The criminal complaint indicates that the codefendant gave a statement to the police on January 10, 2008, during which the codefendant indicated that he and Appellant "were involved in a drug transaction" in which he and Appellant "exchanged three (3) or four (4)" "morphine pill[s], for around \$200.00."

reasonably possible; and (2) the use of the evidence at trial would not unduly prejudice the defendant's preparation for trial." Syllabus, *State v. Hager*, 176 W. Va. 313, 342 S.E.2d 281 (1986).

Syl. pt. 4, *State v. Green*, 187 W. Va. 43, 415 S.E.2d 449 (1992) (per curiam).

B. CIRCUIT COURT COMMITTED NO ERROR IN SENTENCING APPELLANT

On appeal, Appellant asserts that the court committed error when it "utilized the definite term enhancement [of W. Va. Code § 61-11-18(a)] for an indeterminate sentence [on the conspiracy conviction.]" Appellant's Brief at 7. West Virginia Code § 61-11-18(a) provides, in pertinent part, as follows:

[W]hen any person is convicted of an offense and is subject to confinement in the state correctional facility therefor, and it is determined . . . that such person had been before convicted in the United States of a crime punishable by confinement in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under such sentence.

At first "blush," it appears that Appellant is correct. Appellant was convicted of conspiracy to deliver a controlled substance,²¹ which carries a sentence of "not less than one nor more than five years" W. Va. Code § 61-10-31. Using this statute, the court sentenced Appellant to a indeterminate term of one to five years in the penitentiary for the underlying conspiracy conviction. Based upon his conviction of the Recidivist Information, the court then sentenced Appellant to an additional five years on top of the minimum one-year sentence of the underlying conviction for

²¹ West Virginia Code § 60A-4-401(a)(i) makes it a felony to deliver a Schedule II controlled substance punishable by imprisonment for a period of "not less than one year nor more than fifteen years" Under W. Va. Code § 60A-2-206, morphine is a Schedule II controlled substance.

conspiracy, for a total sentence of not less than six years. Viewing the court's sentence and the recidivist statute in isolation, it appears that the court incorrectly added a five year enhancement to Appellant's indeterminate one to five year conspiracy sentence; the statute allows a five year enhancement to be added only in the case of a determinate sentence.

However, Appellant fails to inform the Court that he entered into a plea agreement with the prosecution, in which he stipulated to the prior offenses as charged in the Recidivist Information in exchange for the prosecution making a recommendation to the court that he be sentenced to a minimum of five years. Based upon this plea agreement, the court sentenced Appellant in the manner described above. Now, Appellant ask this Court to ignore the plea agreement between himself and the prosecution and invalidate the court's sentence in this case.

Finally, the court "cut" Appellant a break in sentencing him to only six years. This was Appellant's third time "down," as he has been previously twice convicted for grand larceny and felony possession of a firearm. Given these previous convictions and his current conviction for conspiracy, the court could have sentenced Appellant to life! "When it is determined . . . that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the state correctional facility for life." W. Va. Code § 61-11-18(c).

V.

CONCLUSION

Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Appellee,

By counsel

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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 17h day of June, 2010, addressed as follows:

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Gassaway, West Virginia 26624


BENJAMIN F. YANCEY, III