

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

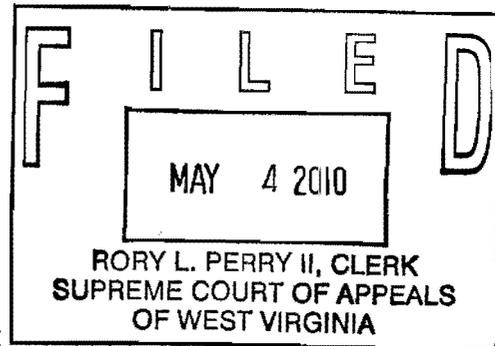
STATE OF WEST VIRGINIA,

v.

Supreme Court No. 35303
Circuit Court No. 08-F-245
(Cabell)

WILLIE SHARP,

Appellant.



APPELLANT'S REPLY BRIEF

Crystal L. Walden
Deputy Public Defender
W.Va. Bar No. 8954
Office of the Public Defender
Kanawha County
Charleston, WV 25330
(304) 348-2323

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY ARGUMENT1

I. The appellant’s assertion of insufficient evidence to support his conviction is based on fact not inference..... 1

II. Officer Hunter’s testimony denied Mr. Sharp the presumption of innocence that is guaranteed to every criminal defendant. Officer Hunter’s testimony informed jurors that Mr. Sharp had been arrested before and had also been to jail before. These revelations were not harmless and could only be cured by declaring a mistrial.....3

RELIEF REQUESTED6

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>State v. Willett</i> , 223 W.Va. 394,400-401, 674 S.E.2d 602, (2009).....	3

REPLY ARGUMENT

I. The appellant's assertion of insufficient evidence to support his conviction is based on fact not inference

The State's reliance on the prosecutor detailing the chain of custody during trial is misguided. The chain of custody does not refute Mr. Sharp's assertion that the wrong physical evidence was tested in his case. In fact, the chain of custody supports Mr. Sharp's argument. Officers held the evidence in both cases in an unsealed form from the time of the second buy until Hunter sealed the evidence and placed the evidence in the evidence locker. The additional fact that strengthens Mr. Sharp's position is the physical evidence Ms. Kirkpatrick describes is an exact description of the physical evidence documented from the second buy. *Tr. 127*

Despite the State's assertion to the contrary, Mr. Sharp's argument of insufficient evidence is supported by a strong foundation of fact. The following facts support appellant's claim of insufficient evidence to support his conviction:

- Mr. Sharp sold one tan chunk to officers *Tr. 41,55, 63*
- The chunk was videoed, described in the police report, property report and during testimony as one solid chunk *Tr. 41, 53, 56 See Also app. A-D Appellant's Brief*
- Ms. Kirkpatrick from the State Police Crime Lab received and tested evidence consisting of "multiple tan chunks" in Mr. Sharp's case. *Tr. 127, App. D Appellant's Brief*
- The unknown individual that sold to officers immediately after Mr. Sharp is on video placing multiple tan chunks in Detective Castle's hand in exchange for \$20 *Tr. 65, See Also DVD, App. A Appellant's Brief*
- From the moment of the second buy until the evidence was field tested and sealed, officers held the evidence from both cases.

- This was a deviation from officers' normal procedures. *Tr. 65*

The State advances an additional argument that it is possible the tan chunk Mr. Sharp sold officers broke while in the State's possession. Ironically, this second argument the State makes in attempting to explain the undisputable discrepancy in the physical form of the evidence sold by Mr. Sharp and the evidence submitted to the crime lab in Mr. Sharp's case relies purely on inference and/or speculation. Furthermore, it is an argument that is being made for the first time on appeal and therefore should be disregarded by this Court as it is not part of the record below.

The State failed to prove beyond a reasonable doubt that the physical evidence tested in Mr. Sharp's case was in fact the same evidence that he transferred to officers. Actually, all of the factual evidence introduced at trial by the State supports Mr. Sharp's contention the wrong physical evidence was tested. Therefore, the State failed to establish all critical elements of their case beyond a reasonable doubt and Mr. Sharp's conviction must be reversed.

II. Officer Hunter's testimony denied Mr. Sharp the presumption of innocence that is guaranteed to every criminal defendant. Officer Hunter's testimony informed jurors that Mr. Sharp had been arrested before and had also been to jail before. These revelations were not harmless and could only be cured by declaring a mistrial.

Counsel disagrees with the State's assertion that Officer Hunter's answer was not responsive to the prosecutor's question. The prosecutor asked him if he was involved in the identification of Mr. Sharp by way of viewing the video footage.¹ Instead of answering yes, he gave a long explanation of the process he and another officer used to identify Mr. Sharp. Therefore, his answer was responsive and was clearly a possible answer to the question asked by the prosecutor. Immediately following trial counsel's objection to Officer Hunter's testimony, the trial court correctly pointed out to the prosecutor the improper inferences Hunter's testimony contained. "It's the inference that he has been incarcerated." *Id.* "The inference that he has a criminal record." *Tr.* 78 The jurors in Mr. Sharp's case decided his fate knowing that he was a "bad guy."² In *State v. Willett*, 223 W.Va. 394,400-401, 674 S.E.2d 602, (2009)(concurring) Justice Ketchum stated:

"...the real world truth is that when a jury hears evidence that a defendant has committed some bad acts beyond those in the indictment, the jury dispenses with any notions that the defendant is innocent and reviews the evidence from the perspective that the defendant is a "bad person." It is undeniable that a jury will

¹ The State's brief asserts that Officer Hunter watched the video surveillance while the transaction was occurring. *State's brief* 9 That is incorrect. Officer Hunter served as back up in the field on the day of the undercover operation. However, Officer Hunter did not watch the video until the officers were back at the station. *Tr.* 75-76

² The state is correct that the trial judge offered to give a cautionary instruction. What the state failed to mention is that the judge also recommended against it explaining to defense counsel that in his opinion the instruction would only call more attention to the improper testimony. *Tr.* 80

be more inclined to convict once they hear that a defendant may have engaged in other “bad acts” ...”

The jurors who decided Mr. Sharp’s fate knew that he did not have a “clean slate,” something even the State concedes they should not have known. The jurors decided his guilt with the improper knowledge that he had a prior criminal record and that he had been to jail before. This clearly had to impact their decision. Because there is a reasonable likelihood it did Mr. Sharp’s conviction must be reversed.

“It was axiomatic that when a person was placed on trial for the commission of a particular crime, if the person was going to be convicted, then the person was going to be convicted based upon evidence showing the person’s guilt of the specific offense charged in the indictment. Nothing more, nothing less.”

Id. at 401

The State’s additional assertion that Officer Hunter’s testimony amounts to harmless error is also incorrect. “[I]n the context of criminal prosecutions, there is nothing ‘harmless’ about the admission of other bad acts evidence.” *Id. at 405* Additionally, the State’s assertion there is overwhelming evidence to convict Mr. Sharp when you remove the improper testimony given by Officer Hunter is incorrect. The State failed to prove a critical element in it’s case: that the substance Mr. Sharp sold was in fact crack cocaine.

Mr. Sharp questioned whether the right physical evidence was tested in his case and the state failed to prove with certainty that the proper evidence was in fact tested. All the evidence: physical, written, video, and trial testimony supports Mr. Sharp’s contention that the wrong evidence was submitted to the crime lab in his case. Even more problematic for the State is that the evidence Ms. Kirkpatrick documented as receiving in

Mr. Sharp's case is an exact match of the physical evidence documented on the dvd from the second buy officers made on that day, not the single chunk Mr. Sharp transferred.

The State never offered an explanation for the undeniable discrepancy in description of the physical evidence sold by Mr. Sharp and that which was submitted for testing in his case by the officers. The State's contention that there was overwhelming evidence of guilt is simply not true. The State failed to rebut Mr. Sharp's assertion that the wrong physical evidence was submitted in his case and, therefore, did not prove a critical element of it's case beyond a reasonable doubt. It is not possible for the State to remedy this mistake due to the way that the evidence was handled by the officers. Therefore, Mr. Sharp's conviction should be reversed by this Court and the charges against Mr. Sharp should be dismissed.

RELIEF REQUESTED

For the foregoing reasons Mr. Sharp requests that this Court reverse his conviction and order that all charges against him be dismissed as to his first assignment of error. If this Court were to grant relief on his second assignment of error, Mr. Sharp requests that this Court reverse his conviction and remand it back the Cabell County Circuit Court for a new trial.

Respectfully submitted,

WILLIE SHARP
By Counsel



Crystal L. Walden
Deputy Public Defender
W.Va. Bar No. 8954
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323

Counsel for Appellant

CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 4th day of May, 2010, I mailed a copy of the foregoing *Appellant's Reply Brief* to R. Christopher Smith, West Virginia Attorney General's Office, 1900 Kanawha Boulevard, East, Room E-26, Charleston, West Virginia 25305.

A handwritten signature in cursive script, appearing to read 'C. L. Walden', written over a horizontal line.

Crystal L. Walden
Deputy Public Defender