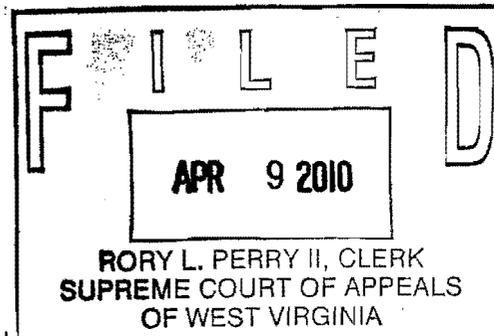


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS,
CHARLESTON**



**STATE OF WEST VIRGINIA,
Appellee**

v.

Case No. 35339

**RICHARD MORRIS,
Appellant**

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

Appellant Richard Lee Morris was convicted of one count of Felony Driving Under the Influence Causing Death, and two counts of Misdemeanor Driving Under the Influence Causing Injury on October 8, 2008. His sole defense at trial was that he was not driving the vehicle. The accident involved two vehicles, a car driven by Ms. Cynthia Hose (who died approximately one month later) and a car owned by Tammy Green-Morris, Appellant's former wife. Ms. Green-Morris claimed Appellant was driving both at the scene and at trial. The State relied upon the testimony of Green-Morris, hearsay testimony regarding statements allegedly made by a nurse Brenda Engle that she observed bruising that may have been caused by driver's side seatbelts, and testimony from a lay phlebotomist that he saw bruises which he believed indicated Mr. Morris was the driver. There were no photographs taken of any bruises. Mr. Morris was convicted after a one day trial and sentenced to two to ten years on the felony count and one year on each of the misdemeanors, to run consecutively. Appellant is currently incarcerated.

STATEMENT OF FACTS

On September 20, 2007, Corporal Vincent Henry Tiong of the Jefferson County Sherriff's Department received a call through Emergency Headquarters regarding a two vehicle traffic accident on Route 340 just north of the intersection of Halltown Road. (*Reporter's Official Transcript of Proceedings*, October 8, 2008, Charles Town, WV, pp. 99-100, hereinafter ("*Transcript*") Upon arriving, Corporal Tiong observed that the accident had apparently occurred in the westbound travel lane heading towards Charles Town, West Virginia. He determined that the white vehicle, a 1997 Nissan Maxima, was registered to Tammie Green-Morris and the red car, a 1997 Hyundai Elantra, was overturned on its roof top off to the right shoulder with its driver still trapped in the vehicle. (*Transcript* at 100-101)

When he arrived, Corporal Tiong spoke with Patrolmen Hess (who was first on the scene), and then talked to Mr. Morris and Ms. Green-Morris. (*Transcript* at 106) Corporal Tiong's discussion with these two revealed that there was a dispute as to who was driving. At trial, when asked why he concluded that Appellant was driving the car, Tiong testified that he was approached by a registered nurse at the hospital, Brenda Engle, who advised him that she had seen on Appellant, "what appeared to be seat belt marks . . . which showed the possibility of wearing a seat belt in the driver's side." (*Transcript* at 114:9-17)

Nurse Engle never testified for the State. However, the above statements were allowed over defense counsel's objections. (*Transcript* at 114:9-17)

Prior to arriving at the hospital, Corporal Tiong took many pictures of Ms. Green-Morris' vehicle. The various pictures included multiple angles of the driver and passenger seats in Ms. Green-Morris' vehicle and captured the condition of the vehicle upon his arrival. (*Transcript* at 100-106; 117-123) Included were photographs showing that the driver's side seat was pulled up further than the passenger seat. (*Id.* at 117-123, testifying regarding Defendant's exhibits 4 and 5) The same photographs also show a cell phone on the passenger seat that was not collected into evidence. (Def's Exh. 4 and 5)

Corporal Tiong also took multiple pictures of a red colored stain on the right side of the driver's seat, one close up, the other capturing the location of the stain in relation to the seat. (*Transcript* p. 117-123; Exh. 9 and 10). During his testimony, Corporal Tiong was unable to confirm that the red stain he photographed multiple times was blood. When asked by defense counsel why he took the pictures of the seat, Tiong testified that "[a]t the time we didn't know what it was, we had no ability of testing it." (*Transcript* at 121). The stain was neither swabbed nor collected into evidence at any time during the investigation. Corporal Tiong also testified that Ms. Green-Morris also had a laceration on the left side of the back of her head. (*Id.* at p. 121-123)

Corporal Tiong also took pictures of the driver's side floor of Ms. Green-Morris' Maxima which showed a beer can and another cell phone on the driver's side floor. (*Id.* at p. 117-123; Defendant's Exh. 7) Neither of these items was

collected, despite the beer can being listed as the foundation for probable cause in his warrant to search the vehicle. After taking the pictures, the car was not preserved as evidence by the Sheriff's Department (despite Ms. Hope being in critical condition). The car was instead handed over to Ramey's Towing, Charles Town, WV. Ms. Hope died of complications in the hospital approximately thirty days later. The State never contacted Ramey's Towing again and ultimately during his pre-trial investigation defense counsel was informed that the vehicle had been sent to a salvage yard and destroyed.¹

During the trial, the State relied primarily on testimony to establish that Mr. Morris was driving the vehicle at the time of the crash. First, Officer Tiong testified that the way that he established Mr. Morris was the driver of the vehicle was based on his conversation with nurse Brenda Engle at the hospital, over the objections of Appellant. Assistant Prosecuting Attorney Brandon Sims represented to the court that Ms. Engle would testify. Engle never testified and Appellant never had an opportunity to cross examine her regarding her apparent diagnosis or the medical report she filled out. The medical report also included inconsistencies regarding both patients bruises that defense was never permitted to cross-examine her about.

None of the witness called by the State saw the driver of the vehicle. Ms. Green-Morris had various inconsistencies in her testimony, and received a

¹ During the investigation for this appeal, the owner for Ramey's towing advised that he mistakenly told Mr. Morris' defense counsel that the vehicle had been destroyed. It was still at the salvage yard. In response, the vehicle was inspected, locating the vehicle but the sunroof had been left open since November, 2007 (over one and a half years). Mr. Ramey further advised that Ms. Green-Morris searched the vehicle and took belongings just before the vehicle went to the salvage yard, but that the State never contacted him after he towed the vehicle.

significant plea deal in the matter in exchange for testifying. (*Transcript* at pp. 153, 166)² In response at closing, the State argued that “even if you don’t believe her” the testimony above regarding the bruises was enough for them to convict Mr. Morris. (*Id.* at p. 202-207)

AUTHORITIES RELIED UPON

United States Constitution Amendments 5, 6 and 14

West Virginia Constitution Article III, Sections 10 and 14

West Virginia Rules of Criminal Procedure, Rule 16

State v. Eyre, 177 W.Va. 671, 355 S.E.2d 921, 923 (1987)

State ex rel. Hawks v. Lazaro, 157 W.Va. 417, 440, 202 S.E.2d 109, 124 (1974)

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974)

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963)

Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 (1988)

California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528 (1984)

United States v. Alexander, 748 F.2d 185 (4th Cir. 1984)

State v. Osakalumi, 194 W. Va. 758 (1997)

State v. Thomas, 187 W.Va. 686, 421 S.E.2d 227 (1992)

² There was also a letter written by Appellant to the family of the victim apologizing for Ms. Hose’s death that was read into evidence by the prosecutor. However, the State did not argue to the jury that this proved Mr. Morris was the driver of the vehicle in its closing.

Hall v. McCoy, 174 W.Va. 787, 329 S.E.2d 860 (1985)

State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985)

Franklin D. Cleckley, West Virginia Criminal Procedure Volume 1, Second

Edition, and *2007 Cumulative Supplement* to Volume 1, Second Edition

ISSUES PRESENTED ON APPEAL

1. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ALLOWING HEARSAY TESTIMONY THAT APPELLANT'S BRUISES INDICATED HE WAS DRIVING
 2. WHETHER THE CIRCUIT COURT COMMITTED PLAIN REVERSIBLE ERROR BY FAILING TO RULE ON APPELLANT'S MOTION IN LIMINE REGARDING STATE'S WITNESS DAVID BENNETT AND SUBSEQUENTLY ALLOWING HIM TO TESTIFY
 3. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE UNDER OSAKALUMI AND BRADY, MAKING HIS TRIAL FUNDAMENTALLY UNFAIR AND IN VIOLATION OF HIS STATE AND FEDERAL DUE PROCESS RIGHTS
 4. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO RULE ON APPELLANT'S MOTION FOR RECONSIDERATION
- I. APPELLANT'S FEDERAL AND STATE DUE PROCESS RIGHTS WERE VIOLATED WHEN THE CIRCUIT COURT ALLOWED HEARSAY TESTIMONY THAT APPELLANT'S BRUISES INDICATED HE WAS DRIVING**

On August 5, 2008, Appellant filed a motion in limine that was argued at the pre-trial proceedings on August 15, 2008. (*Transcript of untitled pre-trial proceedings* August 15, 2008, commencing at 11:25) The motion sought to exclude the testimony of Brenda Engle because she was not qualified to draw conclusions regarding the cause of bruises she purportedly observed. The Court denied the motion and determined that Ms. Engle could testify subject to cross-examination.

However, during the direct examination of Corporal Vincent Tiong, the Court (over defense counsel's objection) allowed the State to introduce rank hearsay testimony concerning his conversations with nurse practitioner Brenda Engle at the hospital. (*Transcript* at pp. 113:8-114:17) As Officer Tiong testified at trial, Engle told him that she observed bruises that "may" have been caused by the driver's side seat belt. Although the State advised the Court that she would testify she was never called as a witness, and was therefore never available for cross-examination by Appellant.³

The confrontation clause of the Sixth Amendment to the United States Constitution, coupled with the Fourteenth Amendment, guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. See *State v. Eyre*, 177 W.Va. 671, 673, 355 S.E.2d 921, 923 (1987); *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 440, 202 S.E.2d 109, 124 (1974); *West Virginia. Const. Art. III § 14*. The right of confrontation means more than simply being allowed to physically confront the witness -- the main purpose of the confrontation is to secure for the defendant the opportunity of cross-examination. See *Davis v. Alaska*, 415 U.S. 308, 315-315, 94 S.Ct. 1105, 1109-1110 (1974).

The Circuit court erroneously permitted hearsay testimony after the State advised it that Ms. Engle would testify:

BY MS. SIMS:

³ As revealed after trial, Engle was called by the State but refused to testify making her statements even more circumspect as confirmed by the State's MOTION TO RULE TO SHOW CAUSE AND HEARING ON THE SAME filed on October 27, 2008. Moreover, Engle's alleged statements were ripe for cross examination since without limitation, she had no personal knowledge of the accident, and her qualifications were at issue as addressed in above-referenced motion in limine.

Q. Officer Tiong, how did you determine that Mr. Morris was the driver of the vehicle at the time of that evening?

A. While I was completing paperwork at the hospital and gathering information I was approached by a registered nurse Brenda Engle.

MR. MCFARLAND: Objection, Your Honor, this is going to be hearsay.

MS. SIMS: Ms. Engle is testifying.

MR. MCFARLAND: Then she can testify to it.

MS. SIMS: I think that this is important to show why Corporal Tiong charged Mr. Morris. I don't think it is indicative of the truth of the matter asserted, I think Ms. Engle will testify as to that. There is another witness who can testify to the same thing.

THE COURT: Well, first of all, we understand even in the objection that this witness will testify to this so necessarily all that this witness on the stand right now would need would be why he did so. This witness is not at liberty to give the testimony of that other witness but just to tell what it was that he did.

All right, go ahead, Madam Prosecutor.

BY MS. SIMS:

Q. Corporal Tiong, why did you charge Mr. Morris with driving the automobile that caused the accident?

A. I received information from the nurse from marks she observed on him.

Q. What kind of marks?

A. She observed that there was what appeared to be seat belt marks going up the left area down to the lower right area which showed the possibility of wearing a seat belt in the driver's side.

Transcript at pp. 113:8-114:17

Tiong's statements were *highly prejudicial* and inadmissible hearsay, and despite the State's arguments was clearly offered for the truth of the matter asserted -- that Appellant was driving the car. The damage of the erroneous decision by the Court to permit the hearsay was compounded by Appellant's inability to cross-examine Engle and the State's repeatedly arguing the point during closing.

As Ms. Sims hammered home in her closing:

"Again, the key element here is who was driving. You know who was driving. Who had the seat belt bruise for the driver's seat. Mr. Morris. Who had the seat belt bruise for the passenger side? Ms. Green. I don't think you need to consider anything else as to who was driving." *Transcript*. at 205:23-206:3

In effect, the bruises became the evidentiary lynchpin for the prosecution, used to bolster its scant and unreliable evidence elsewhere in the case. For the above reasons, Appellant respectfully requests that this Court reverse his conviction based on this highly prejudicial legal error.

II. THE TRIAL COURT COMMITTED PLAIN REVERSIBLE ERROR BY FAILING TO RULE ON APPELLANT'S MOTION IN LIMINE REGARDING STATE'S WITNESS DAVID BENNETT AND SUBSEQUENTLY ALLOWING HIM TO TESTIFY

On September 26, 2008, Defendant after the initial round of pre-trial motions and before the trial on October 8, 2009 filed a motion in limine

requesting that the court exclude the testimony at trial of one David Bennett, a lay phlebotomist. Among other things, the motion requested exclusion because the State had failed to abide by the *West Virginia Rules of Criminal Procedure*, Rule 16(a)(1)(E). Specifically, Appellant was never advised what the subject of Mr. Bennett's testimony would be. The court never ruled on the motion and Mr. Bennett was allowed to testify at trial.

As a result of his testimony and the State's failure to comply, Appellant was completely surprised and caught off guard when David Bennett (a phlebotomist) gave what amounted to expert testimony regarding the cause of bruises that he observed on Appellant. There was no foundation laid by the prosecution that Bennett was either qualified or capable of drawing such conclusions. Further, since counsel for Appellant had no notice that Mr. Bennett was going to testify about bruises, let alone the cause of bruises he had no time to prepare or conduct any meaningful cross-examination. (*Transcript* at pp. 136-140)

Moreover, since the State never called Ms. Engle and there was never an opportunity for her to be cross-examined, Mr. Bennett's testimony was the only testimony by a State witness that actually saw bruises on Appellant. As a result, of the Court's failure to rule on Appellant's Motion in Limine, and subsequently allowing Mr. Bennett to testify without the defense having any idea what his testimony was, Appellant's Due Process Rights were violated as the testimony was highly prejudicial and defense counsel was unable to conduct a meaningful cross-examination.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION IN LIMINE UNDER OSAKALUMI AND BRADY AND AS A RESULT APPELLANT'S TRIAL WAS FUNDAMENTALLY UNFAIR AND IN VIOLATION OF HIS STATE AND FEDERAL DUE PROCESS RIGHTS

In the instant case, during pretrial motions on August 15, 2008 the Circuit Court when confronted with a motion under *State v. Osakalumi*, 194 W. Va. 758, 461 S.E. 2d 504 (1997) (hereinafter "*Osakalumi*"), requesting exclusion evidence and at a minimum a cautionary instruction, the court erroneously denied Mr. Morris' motion, as it failed to go through the analysis required by that case.⁴

In *Osakalumi*, this Court held that although the federal Constitution was not violated, the West Virginia due process clause was infringed upon when the state failed to preserve critical evidence that could be exculpatory for the defendant. (See *Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure*, 2007 Cumulative Supplement, Volume 1, Second Edition). As specifically required in *Osakalumi, supra*, Syl Pt. 2 and subsequent case law, the Circuit Court was required to do the following under the circumstances and did not do so:

"When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either *West Virginia Rule of Criminal Procedure 16* or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the

⁴ Based on the record, it appears that the Court based its decision mistakenly on the State's argument that Appellant was required to show bad faith on the part of the State.

State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction." *Id.* at 505, Syl. Pt. 2

In the instant case, Appellant filed "Defendant's Motion for Discovery" on January 25, 2008, under Rule 16 requesting that the State turn over to him "all tangible objects. . . which are material to the preparation of his defense. . ." (Defendant's Motion for Discovery, ¶5, p.1). Further, in Paragraph 20 of Defendant specifically requested all "Exculpatory and Impeachment Evidence" which read in full:

Pursuant to Brady v. Maryland, 83 S. Ct. 1194 (1963), Kyles v. Whitely, 115 S. Ct. 1555 (1995), and it's progeny, the defendant requests that the State provide to defense counsel, in writing and prior to trial, all exculpatory materials favorable to the accused and which may negate or tend to negate the guilt for the offense alleged or which may mitigate punishment, and all evidence which could reasonably weaken or impeach any evidence proposed by the State to be introduced against the Defendant. W.Va. Const. art. 3, secs. 10 and 14, U.S. Const. amends 5, 6 and 14.

Moreover, on January 25, 2008 with the discovery request counsel John McFarland also sent a letter to Assistant Prosecuting Attorney Brandon Sims stating that it was his belief that the at-issue vehicle was in State Custody. The State never responded to that letter, and even in the pre-trial hearing on the motion in limine the State refused to discuss the car as it is clear they never attempted to locate it. As Assistant Prosecuting Attorney Sims stated at the hearing on August 15, 2008:

THE COURT: Well, what happened to the car?

MS. SIMS: Judge, I can't speak to that.

(Transcript of August 15, 2008 proceedings at p. 14.)

Notwithstanding Mr. Morris' specific request, the State failed to turn over the car or any of the evidence photographed in the car. As an initial matter, it is apparent based on the context of the entire record that the State had in its control the car and the evidence at the accident scene since Ms. Green-Morris was injured and at the hospital and Officer Tiong, the lead investigator, released the car to Ramey's towing. Ultimately, the evidence that was destroyed included at a minimum:

- Suspected Blood evidence on the left side of the driver's seat consistent with the laceration to the back of the head of Tammy Green-Morris as documented in Tiong's report and the medical records (Defense Exhibits 10-13).
- Verification through measurement of the precise location of the seat positioning apparent in the photographs confirming that the driver's side seat was pulled up significantly in contrast to the passenger side seat.
- The cell phone on the floor of the driver's side of the vehicle which could have easily been collected and examined. (Def. Exh. 7)
- The cell phone on the seat of the passenger side of the vehicle which could have easily been collected and examined.
- The Budweiser beer can on the floor of the driver side of the vehicle floor which could have easily been collected but was destroyed despite it being

photographed and listed as evidence of probable cause to search Ms.

Green Morris' vehicle. (Def. Exh. 7)

Mr. Morris asserts that he has a right to a new trial based on the Circuit Court's failure to engage in the required full analysis and/or erroneous decision as it concerns the missing evidence in his case. An accused has a right to a fair trial and in order to insure fundamental fairness, the police have a duty to preserve physical evidence that it knows or reasonably knows will exculpate an accused and can be easily preserved. *State v. Thomas*, 187 W.Va. 686; *State v. Osakalumi*, 194 W.Va. 758, 461 S.E. 2d 504 (1995); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963); *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1988); *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528 (1984).

In this instance, Appellant argues without limitation that the State had a duty to preserve the car as evidence for the following reasons: 1) the evidence was material, relevant and potentially exculpatory as evidenced by Officer Tiong's photographs; 2) the Defense had requested the car both specifically in its letter and generally in the Discovery request; 3) the prosecution was on notice based on the letter, that the defense believed that the car at-issue was material to Appellant's defense, exculpatory and in the State's possession immediately after the original indictment of Appellant on or around January 25, 2009.

If Brady materials are requested, the prosecution must be unequivocal in its response as to whether such materials are in the prosecution's possession. *United States v. Alexander*, 748 F.2d 185 (4th Cir. 1984). Failure to produce exculpatory evidence after it is requested is reversible error, (*Hall v. McCoy*, 329

S.E.2d 860 (W.VA. 1985)), and this is so even if the prosecution does not have present possession of the documents but may readily gain possession of them. *Franklin D. Cleckley, West Virginia Criminal Procedure Volume 1* Second edition, *citing Id.*, See also *State v. Miller*, 336 S.E.2d910 (W.VA. 1985). The State's response to the Court's Inquiry about the car, "I can't speak to it" is clearly legally insufficient.

As a result of the above, Appellant was denied a fair trial in violation of his State and Federal Due Process rights. The Circuit Court's denial and decision not to provide any sort of cautionary instruction compounded the problem. Finally, the scant and dubious nature of the remaining evidence at trial as evidenced above made the destruction of the evidence in the car, and the car all the more crucial. The confluence of all these factors resulted in a fundamentally unfair trial, and a violation of Appellants State and Federal Due Process Rights.

IV. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO RULE ON APPELLANT'S MOTION FOR RECONSIDERATION

On April 10, 2009 Appellant brought a MOTION FOR RECONSIDERATION before the Circuit Court for various reasons, including without limitation, that the sentences as imposed were excessive punishment since they were run consecutively by the court despite the facts including that the crimes were born from the same incident, and that the police failed to preserve the evidence in this matter. As of the filing of this appeal on August 13, 2009, the Circuit Court has not issued an order or set a hearing for the motion to reconsider. Appellant asserts that the Circuit Court's complete failure to even recognize his

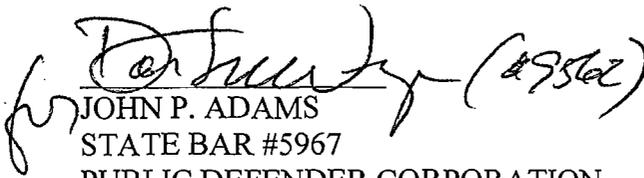
motion filed some four months ago is in violation of his Due Process Rights and is further grounds for reversal of his conviction.

V. **CONCLUSION**

For the reasons set forth above it is clear that the Appellant's conviction must be reversed.

WHEREFORE the Appellant respectfully prays that the Court overturn the verdict and enter an order remanding this case as well as any other relief that the Court deems appropriate.

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CERTIFICATE OF SERVICE

I, John P. Adams, Esquire, Public Defender, hereby certify that I have delivered a copy of the attached BRIEF FOR APPELLANT to Darrell McGraw, Christopher Smith and Silas Taylor located at the Attorney General's Office, State Capitol Bldg., Room 1 Room E-26, Charleston, WV 25305, on this 8th day of April, 2010.

for *Darrell McGraw (45562)*
JOHN P. ADAMS, ESQUIRE