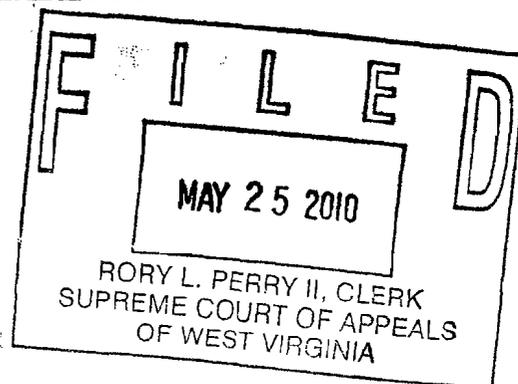


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS,  
CHARLESTON**



**STATE OF WEST VIRGINIA,  
Appellee**

**v.**

**Case No. 35339**

**RICHARD MORRIS,  
Appellant**

**REPLY BRIEF FOR APPELLANT**

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**I. APPELLEE'S HEDGED OPPOSITION REGARDING OFFICER TIONG'S HEARSAY TESTIMONY TO PROVE THE EXISTENCE, NATURE AND CAUSE OF APPELLANT'S ALLEGED BRUISES IS DUBIOUS ON MANY LEVELS**

**A. Hearsay Testimony Cannot Be Saved By a Dubious Claim That it Was Offered to "Explain" Why Officer Tiong Arrested Appellant When it Necessitates That the Officer Assumed the Truth of the Matters Asserted**

Appellee cannot seriously be arguing that the State presented the hearsay testimony by Nurse Engle regarding the existence, nature and cause of Appellant's alleged bruises not *for that reason*, but instead, to explain why Officer Tiong charged Appellant. To do so Appellee would have this Court embrace an exception that would swallow the hearsay rule in West Virginia. Of course in order to charge Appellant, Officer Tiong did have to assume the truth of the matters asserted by Nurse Engle, and as such, her statements are hearsay. Moreover, the trial court erroneously allowed the statements to come in with no foundation because the State said that Engle would indeed testify.

In support of their position that the statements were "not offered to prove the truth of the matters asserted" Appellee cites *State v. Phelps*, 197 W. Va. 713, 721-724 (1996), a case decided by this Court with very specific facts that is inapposite. In *Phelps*, this Court allowed testimony by police officers regarding: 1) an anonymous phone call which led them to include defendant as a suspect in a police line up; and, 2) defendant's other charges. *Id.* at 722. Appellee fails to

explain with any specificity how *Phelps* would justify the hearsay erroneously allowed by the trial court in this case.

In *Phelps* unlike this case, the testimony was restricted, limited and did not concern the primary witness in the prosecution's case. Further, the witness, an anonymous caller was presumably unavailable, and the testimony which was a small part of the prosecution's case was offered to explain why the police included the defendant as a suspect. *Phelps* simply does not support Appellee's position. The jury in *Phelps* did not have to assume the truth of the matters asserted by the anonymous caller in order to convict the defendant. It is readily apparent in the record in this case, that the State offered Tiong's testimony to prove the truth of the matter asserted, namely, the existence, nature and cause of the alleged bruises which became the linchpin of the prosecutor's case.

**B. Under West Virginia Rule of Criminal Procedure 52(a) and the Constitutions of West Virginia and the United States the Error by the Trial Court Made Appellant's Trial Fundamentally Unfair**

Appellee misinterprets this court's holding in *State v. Hemlick*, 201 W. Va. 163 (1997) in their opposition by citing Syllabus Point 4 without explaining the underlying facts and circumstances. It is true that in *Hemlick*, this Court in what is apparent dicta, held that "even if the statement at issue was error," "[g]enerally, an error admitting hearsay evidence is harmless where the same fact is proved by an eyewitness or other evidence clearly establishes the defendant's guilt. *Id.* at 171. Yet, upon further examination *Hemlick* is also of no help to Appellee in this matter.

First, as noted by this Court in *Hemlick* the admission by a co-conspirator “was not reversible error because it could properly have been admitted under the statement against interest hearsay exception provided for by Rule 804(b)(3) of the West Virginia Rules of Evidence.” *Id.* Accordingly, since the statement fell under that exception it had the requisite indicia of reliability to be allowed as evidence. In contrast, the testimony in this matter has no such indicia of reliability. In fact, the reliability of the hearsay was called even further into question since Engle apparently failed to comply with a subpoena.

Second, and further complicating Appellant’s reliance on *Hemlick*, is that the witness was unavailable in that case and the prosecution has failed to demonstrate Engle was unavailable in this case. Three, the admission of the hearsay testimony in this matter effected **substantial rights of Appellant** and was of a **constitutional nature** since Appellant had a right to confront the State’s primary witness.

As this Court noted in *State v. Maynard*, 183 W. Va 1, 5-6 (1990), the primary case relied on in *Hemlick* in discussing the issue,

West Virginia Rule of Criminal Procedure 52(a), however, provides that “[a]ny error, defect, irregularity or variance **which does not affect substantial rights** shall be disregarded.” In interpreting this rule, we have previously held in Syl. Pt. 6, *State v. Smith*, W. Va. , 358 S.E.2d 188 (1987) that:

‘Where improper evidence **of a non-constitutional nature** is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State’s case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant’s guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis

must be made to determine whether the error had any prejudicial effect on the jury.’ *Id.* (citations in original, emphasis added)

Finally, and without conceding the point, even if this Court somehow found that the hearsay at issue in this matter is of a “non-constitutional nature” or didn’t affect Appellant’s “substantial rights” it still would not qualify as harmless under any test considered by this Court. As the record shows, the evidence was not “proved” by another eye-witness as Appellee asserts. The only other witness regarding the existence, nature and cause of the alleged bruises was a lay phlebotomist whose undisclosed testimony is also an issue in this appeal, and who at trial admitted that he had no training to diagnose the cause or nature of the bruises. Moreover, there were never any pictures taken of these alleged bruises by the officers or medical staff and the only person that *may* have been qualified to testify about them, Engle, never did.

**C. The State Failed to Exercise Due Diligence in Compelling Engle to Testify**

In what appears to be a *post-facto* effort in Appellee’s Opposition to mitigate the State’s misrepresentations to the trial court, Appellee claims that Nurse Engle “defied a subpoena”. (See Response to Petition for Appeal at 10; Brief of Appellee at 7). Yet, there is no evidence that the State ever exercised any diligence to compel Engle to testify once it got the trial court to erroneously let in Tiong’s hearsay and violated Appellant’s constitutional rights. In fact, the State never requested that the court act in any way on the subpoena *during trial* to

compel Engle to testify. Instead, approximately three weeks later and after Appellant was convicted, the State filed a Motion with a noticed hearing where Engle promptly showed up and no sanctions were imposed by the trial court.

This Court cannot allow what resulted in a fundamentally unfair trial. The State slept on its right to compel Engle until three weeks after trial after making misrepresentations to the trial court and Appellant's counsel and in violation of Appellant's right to cross-examine Engle. Appellant respectfully requests a new, fair trial.

**II. DAVID BENNETT WAS LISTED AS AN EXPERT WITNESS UNDER RULE 16(a)(1)(E) FOR THE LIMITED PURPOSE OF BLOOD DRAWING AND HIS TESTIMONY REGARDING THE DIAGNOSIS AND CAUSATION OF BRUISES WAS UNEXPECTED EXPERT TESTIMONY**

David Bennett's testimony was plain error and was wholly inappropriate. First, Bennett was listed as a witness for the limited purpose of the blood draw but without notice was allowed to testify regarding the existence, nature and cause of Appellant's alleged bruises. Apparently, after the State's witness failed to show up to testify, the State decided to sneak in Bennett's testimony regarding the bruises despite never disclosing it under Rule 16(a)(1)(E) or laying the appropriate foundation.

Appellee's argument in their opposition that Bennett's diagnosis of bruises from a seat belt was "lay testimony" is dubious at best. The State was soliciting statements from Bennett that amounted to a medical diagnosis and expert testimony regarding causation of the same without the appropriate disclosure and foundation. Accordingly, it was plain error as was the trial court's failure to rule

on the motion in limine requesting that he not testify at all since the preliminary issue at trial was the identity of the driver.

Further, the fact that the State solicited the testimony at issue without notice after it apparently knew Engle was not complying with its' subpoena *instead of compelling Engle to testify* could reasonably call into question the State's motives.

**III. APPELLEE'S ATTEMPT TO RECHARACTERIZE THE STATES' DESTRUCTION OF EVIDENCE THAT WAS IN POLICE POSSESSION AT THE TIME OF THE CRASH AND GIVEN TO THIRD PARTIES WITHOUT BEING APPROPRIATELY DESIGNATED OR COLLECTED AS EVIDENCE FAILS UNDER THE OSAKALUMI AND BRADY LINE OF CASES**

In light of Appellee's claim that the police's negligence and/or bad faith is dubious in this matter it may be necessary to reemphasize the following. 1) Tammy Green-Morris' car was clearly totaled and in the police's possession at the scene of the accident since she was at the hospital and they released the car to the towing company; 2) Officer Tiong knew the evidence in the car was relevant based off of his numerous photographs, and that the identity of the driver was the primary issue in the investigation; 3) Tiong knew that Ms. Hope was potentially going to die, or at a minimum, that she was in critical condition; 4) Tiong negligently and/or in bad faith failed to designate the car as evidence, by simply checking a box on the towing form and as a result allowed their witness and the other suspect, Green-Morris to access the vehicle and have it and the evidence destroyed; 5) Tiong and the State negligently and/or in bad faith failed to

subsequently designate the vehicle as evidence at any time during their investigation before or after Ms. Hope's subsequent death.

Appellant also disputes Appellee's claim that the items and evidence in the car was not exculpatory. As mentioned, Officer Tiong's multiple pictures of the apparent blood stains on the seat at approximately head level in combination with the fact that Green-Morris had a cut on her head strongly suggest that the blood evidence was in fact exculpatory. Moreover, the cell phones located on the driver side floor and the passenger seat were exculpatory because though they were the same type of phone their call history would have demonstrated that Appellant's phone was in the passenger seat and not on the driver's side floor. While Appellee may argue, like a magic-bullet (and similar to their argument in relation to the blood) that the phone "could" have gotten switched during the accidents, Appellee is creating improbable scenarios and cannot explain why clearly *relevant* evidence, and as Appellant asserts, exculpatory evidence was negligently, or in bad faith destroyed.

#### **IV. THE CIRCUIT COURT'S FAILURE TO RULE ON THE MOTION FOR RECONSIDERATION DOES NOT EFFECT THIS APPEAL**

Appellant simply respectfully asserts that the failure by the trial court to respond to a formally filed motion is yet another indication of the unfair proceedings he encountered at the trial level. However, since the trial courts' original decision was final, Appellant is not forfeiting his right to a timely appeal bringing up the matter before this Court.

V. CONCLUSION

As evidenced by the record, and specifically her closing, the State primarily relied upon the hearsay testimony of Officer Tiong who claimed that nurse Brenda Engle said there were bruises on Appellant, in certain areas (without photographs or extrinsic evidence), and that they were caused by a seatbelt, *maybe* from the driver's seat. Nurse Engle was never produced despite representations by the State to the trial court and Appellant to the contrary. Nurse Engle was never cross-examined and was allowed by the State and the trial court to ignore her subpoena. Instead, to the surprise of the defense and in plain error a lay phlebotomist was called in to corroborate the hearsay. David Bennett, a man who with no apparent diagnostic skills, determined within hours that alleged bruises were caused by seat belts. Appellant respectfully requests that this Court reverse his conviction and grant him, a new and fundamentally fair trial.

WHEREFORE Appellant respectfully prays that this Honorable Court overturn the verdict and enter an order reversing his conviction, 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 REPLY BRIEF FOR APPELLANT to Christopher Smith, Attorney General's Office, State Capitol, Room E-26, Charleston, WV 25305, on this 24<sup>th</sup> day of May, 2010.

*For* John P. Adams (WV BAE # 9029)  
JOHN P. ADAMS, ESQUIRE