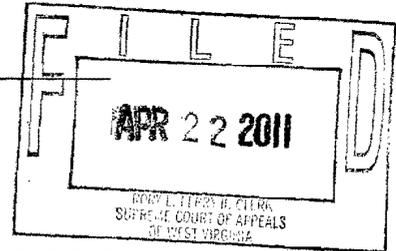


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101457

CHARLESTON



STATE OF WEST VIRGINIA ,
RESPONDENT,

v.

ARNOLD WAYNE MCCARTNEY,
PETITIONER

REPLY BRIEF

Dennis J. Willett, Esq.
Nanners & Willett, L.C.
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048
WV Bar No. 7095

Steven B. Nanners, Esq.
Nanners & Willett, L.C.
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048
WV Bar No. 6358

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STATEMENT OF THE CASE

Your Petitioner was convicted in the Circuit Court of Lewis County, West Virginia on February 18, 2010, of the offense of First Degree Murder without a recommendation for Mercy. Your Petitioner has sought an appeal of his conviction and sentence setting forth various assignments of error. Your Petitioner asserts that his conviction and sentence should be overturned and set aside as a result of the numerous instances of error committed during his trial proceedings.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Your Petitioner requests that he be afforded oral argument with respect to the issues set forth in his Petition for Appeal and

ARGUMENT

A. WHETHER THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA, ERRED IN DENYING THE PETITIONER'S MOTION TO DISMISS FOR FAILING TO AFFORD THE PETITIONER A SPEEDY TRIAL DUE SOLELY TO THE STATE'S FAILURE TO PROVIDE TIMELY DISCOVERY.

The State of West Virginia in its Response to Petition for Appeal argues that the Petitioner's trial was continued for "good cause" insofar as the Prosecution failed to provide discovery that was in the possession of the State but not delivered to the Prosecuting Attorney.

It is clear from the record that the circumstances which led to the continuance of the Petitioner's trial did not constitute "good cause." Further, the Trial Court erred in continuing the trial when the State indicated that it had already provided discovery that constituted what the prosecutor characterized as the "guts of its case."

During the hearing on Petitioner's Motion to Exclude on October 22, 2009, the Prosecuting Attorney did not seek a continuance of the trial, but rather sought to have the Court rule that only certain items should be excluded for failure to disclose. In fact, from his argument, it was readily apparent that the State believed it could proceed to trial based upon evidence that was disclosed that the Prosecutor identified as constituting the "guts" of the State's case. The Prosecutor stated to the Court,

My Motion to Exclude, Your Honor, or my response to their Motion to Exclude does address the matters that were supplied promptly, as mentioned by Mr. Willett and as set forth in the Motion to Exclude, right after the preliminary hearing back in January, the both defense counsel and I went out to the State Police barracks and met with the investigating officer, and at that time, the defense was provided with what I'll refer to as the guts of the State's case, which were the statements of Arnold McCartney and those have already been the subject of the suppression hearing

where they were ruled admissible, the statement of Brian – two statements of Brian Joseph, Jason Dehainant, Charles McCartney and Steven Mealey. I believe those would fall within – although not formally attached to the – well, they were made prior to – the discovery motion was filed in March and they were provided back in January, so they were provided to the defense prior to the discovery motion being filed. The testimony of Trooper Morgan and Trooper Brewer, as the statements made by Defendant have been addressed and ruled admissible by the Court and then Trooper Morgan supplied his narrative of what happened and 30 pictures on a CD that was supplied to the defense. I never received a copy of it. I was to have received a subsequent copy of what they did, the CD of 30 pictures and those depict 30 of the 84 pictures so any of the – those 30 pictures have been in the possession of the defense since then. At the preliminary hearing, there was testimony about the coroner, the county coroner and Patrick Tomey, as to the cause of death, I believe, Your Honor.

So I would ask that if the Court grant the Motion to Exclude, that it not encompass those matters and the matter – the cause of death is shown by the photographs given to the defense at that time, clearly show a gaping hole in the skull of the victim and I don't think there's any controversy –

See Transcript, p. 10-11, October 22, 2009.

It is the position of your Petitioner that as the State indicated from its response to the Motion to Exclude that it was ready to proceed to trial as it had already provided the “guts” of its case to the defense, the Trial Court should not have decided to continue the matter on its own Motion. In making that decision, the Trial Court abandoned its duty of impartiality under Canon 3 of the Rules of Judicial Conduct and in effect acted in the prosecutions behalf all without imposing any sanction whatsoever upon the State for its failure to abide by its duties.

The Respondent, citing *State ex. rel. Workman v. Fury*, 168 W. Va. 218, 282 S.E.2d 851 (1981), asserts that “good cause” existed because the State Police failed to deliver discoverable evidence to the Prosecuting Attorney despite his “good-faith efforts” and thus the failure to provide discovery was “not within the prosecutor’s control.” (Response to Petition for Appeal,

p. 10.) This assertion is clearly wrong. Notwithstanding the fact that the evidence sought to be excluded was in possession of the State no later than June, 2009, the failure of the investigating officer to deliver the same to the Prosecutor does not constitute "good cause." *West Virginia Code*, § 7-4-1, provides:

It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material. Every public officer shall give him information of the violation of any penal law committed within his county.

West Virginia Code, § 7-4-1.

Clearly, *West Virginia Code*, § 7-4-1, mandates that the State Police provide the Prosecuting Attorney with information regarding criminal violations and even provides a mechanism for securing necessary information. Further, this Court has repeatedly held that the existence of evidence in possession of the State's investigators is imputed to the Prosecuting Attorney. See *State v. Hawk*, 222 W.Va. 248, 664 S.E.2d 133 (2008); *State v. Farris*, 221 W.Va. 676, 656 S.E.2d 121 (2007); *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007); *State v. Hall*, 174 W.Va. 787, 329 S.E.2d 860 (1985). As the prosecution asserted during the hearing on Petitioner's Motion to Exclude, the evidence which the Petitioner sought to exclude was in possession of the State no later than June, 2009, yet the State made no effort until October 9, 2009, two weeks prior to trial to provide the same to the Defendant despite their obligations under the Rules of Criminal Procedure and the Trial Court Rules.

The continuance of the Petitioner's trial could only be effectuated upon a showing of "good cause." See *Good v. Handlan*, 176 W.Va. 145 (1986), See also, Syl. Pt. 4, *State ex. rel.*

Shorter v. Hey, 171 W.Va. 249, (1981). A continuance may not be granted "pro forma". *Good v. Handlan*, 176, W.Va. 145 (1986). The phrase "pro forma," in an appealable decree or judgment, usually means that the decision was rendered, not on a conviction that it was right, but merely to facilitate further proceedings. *Black's Law Dictionary*, 1212 (6th Edition, 1990), referencing *Cramp & Sons S. & E. Bldg. Co. v. Turbine Co.*, 228 U. S. 645, 33 S. Ct. 722, 57 L. Ed. 1003 (1913). The Respondent appears to urge this Court to adopt a "good-faith efforts" exception to the plain and unambiguous lawful requirements of the State's duty to provide discovery in a timely manner and in essence disregard the mandatory duties of the Prosecuting Attorney and his investigators.

B. WHETHER THE CIRCUIT COURT ERRED IN RULING THAT THE PETITIONER'S STATEMENT ADDUCED BY THE INVESTIGATING OFFICER AT THE CENTRAL REGIONAL JAIL ON DECEMBER 21, 2008, WAS ADMISSIBLE.

In its argument regarding the admissibility of the Petitioner's statement given while incarcerated upon at the Central Regional Jail prior to presentation to the Magistrate Court, the State argues that the statement should be admissible in that this statement was the same as the first statement provided by the Petitioner. The State cites *State v. Dyer*, 177 W. Va. 567, 355 S.E.2d 356 (1987) in this regard. *State v. Dyer*, however, presents a different circumstance than those that arose in the instant case. In this case, there is no dispute that the Petitioner was placed under arrest for Murder in the First Degree and thereafter taken to the Central Regional Jail, incarcerated and thereafter questioned by the investigating officer. Further, this case presents the added circumstance of having a Defendant of such little intelligence that he could not even read or write, much less appreciate the true import of the waiver of his right to remain silent. See *State v. Adkins*, 170 W.Va. 46, 289 S.E.2d 720 (1982).

The Petitioner's lack of normal intelligence, coupled with the circumstance of his incarceration and the delay before being advised of his rights by a neutral magistrate clearly indicate that under a totality of the circumstances analysis, the second statement of the Petitioner should have been excluded. It is quite apparent based upon the testimony of Trooper Morgan that he sought to obtain the second statement prior to the Petitioner's appearance before the Magistrate and the appointment of Counsel. During the hearing on the admissibility of the Petitioner's second statement, the testimony clearly indicates that Trooper Morgan went to the Central Regional Jail because he wanted to get another inculpatory statement from the Defendant. It is quite disconcerting that Trp. Morgan even went so far to testify that he would have sought to obtain the statement even if Counsel had been assigned to the Petitioner's case. Trp. Morgan went so far as to state,

Q Okay, so you called in to the Magistrate Court to make sure that he hadn't been arraigned, so you could get down there before he got the lawyer, right?

A No, just to see if he asked for a lawyer. If he hadn't asked for a lawyer, I would have still went down and tried to speak to him. **I've done that on many occasions, even after they asked for a lawyer.**

See Transcript, pp. 31-33, September 2, 2009. (emphasis added.)

The prior decisions of this Court relative to prompt presentment issues clearly relate to the circumstance at hand. As this Court held in *State v. Persinger*, "[t]he delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant." Syl. Pt. 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982); see also, *State v. Mitter*, W.Va., 289 S.E.2d 457 (1982).

The conduct of Trp. Morgan in obtaining the second statement of the Petitioner at the Central Regional Jail was occasioned upon Trp. Morgan's decision to obtain additional

inculpatory evidence from the Petitioner before he could appear before a Magistrate. Trp. Morgan's admission that he often seeks statements from Defendant's even after they have requested Counsel must give great pause to consider the appropriateness of this second statement. In light of such testimony it is perfectly logical to conclude that Trp. Morgan's intent was to take full advantage of the delay in presentation before the Magistrate to gather as much inculpatory evidence from the Petitioner before the Petitioner could be consult with a Magistrate or Counsel and make a more informed decision on whether he wished to invoke his right to remain silent.

C. WHETHER THE CIRCUIT COURT IMPROPERLY ADMITTED THE ALLEGED MURDER WEAPON INTO EVIDENCE WITHOUT THE STATE HAVING PROPERLY ESTABLISHED A CHAIN OF CUSTODY THERETO.

The State of West Virginia in its response to the Petitioner's argument regarding the chain of custody of the alleged murder weapon asserts that the Trial Court Judge properly admitted the same into evidence as being satisfied that the chain of custody of the same had been properly established. This Court has held that the requirement of the establishment of a chain of custody to an item of evidence is necessary to ensure that the offered item is the same item and is in substantially the same condition as when it was seized. See *State v. Knuckles*, 473 S.E.2d 131 (1996); and *State v. Dillon*, 447 S.E.2d 583 (1994). The Response to Petitioner's Appeal focuses on the Court's discretion in admitting the item into evidence and asserts that no allegation was offered or evidence produced to show that the weapon was not genuine or tampered with. A review of the record, however, shows these assertions to be erroneous.

It must be noted that the evidence relative to the alleged murder weapon was not provided in discovery, even after the Court had continued the trial as a result of the State's

failure to provide the same. In its own ruling on the Petitioner's Motion to Exclude in the October 22, 2009, hearing, the Court ordered the State to provide all discovery to the Defendant and specifically ruled, "[a]nything not disclosed at that time is inadmissible." See Transcript, pp. 17-18, October 22, 2009. Despite this, the evidence relating to the chain of custody of the alleged murder weapon was not provided. Your Petitioner contends that the Trial Court abused its discretion in admitting the items into evidence without Petitioner's Counsel being afforded the opportunity to investigate the weapon's chain of custody and ignoring its own ruling.

The State's assertion that there was no allegation or evidence to show that the weapon was not genuine is false based upon a reading of the record. During the Petitioner's trial, the attesting witness to the weapon admitted that the evidence submission form which accompanied the alleged murder weapon to the forensic laboratory had not been completed by the Receiving Technicians. See Transcript, p. 321, February 17, 2010. It must be noted that the submission form was not provided to the Petitioner as part of discovery.

The failure of the State to provide relevant and easily obtainable discovery material relating to the alleged murder weapon and the failure of the State to make an attempt to secure the appropriate witnesses or documentary evidence to establish a basic chain of custody clearly illustrates it failed to establish the same.

D. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONIAL EVIDENCE RELATING TO THE VICTIM'S CAUSE OF DEATH.

The State of West Virginia's response to further illustrates that the Trial Court erred in admitting testimonial evidence from Patrick Tomey regarding the cause of death. The State seeks to support the Trial Court's ruling by citing the Petitioner's statements to establish the cause of death.

This argument is without merit. It cannot be argued that Petitioner, who could not even read or write, could make a determination of the cause of death. Aside from the Petitioner's statement, the only other evidence would be from Patrick Tomey, whose qualification's to render a medical opinion as to the cause of death were never established beyond the fact that he was the county coroner. Mr. Tomey was not appropriately qualified as a witness who could offer such testimony.

E. WHETHER THE PETITIONER WAS DENIED FUNDAMENTAL DUE PROCESS OF LAW WITH RESPECT TO THE CONDUCT OF THE PROCEEDINGS HELD DURING THE "MERCY" PHASE OF THE TRIAL FOLLOWING THE PETITIONER'S CONVICTION FOR MURDER IN THE FIRST DEGREE.

The Respondent's assertion that the Petitioner was not denied due process of law by the failure of the Trial Court to afford him the opportunity to present final argument during the mercy phase of the trial is without merit.

The State cites *Collins v. Kansas Miller Co.*, 485 P.2d 1343 (1971), as its only authority to assert that your undersigned Counsel waived the Petitioner's right to final argument through silence. That case is wholly inapplicable to the instant case in that *Collins* was a Kansas Supreme Court case dealing with a worker's compensation matter. Interestingly, the State further responds to this assignment of error by asserting that the Petition for Appeal contains no authority from this Court or any other Court to show that the Trial Court erred in failing to provide the Petitioner with the opportunity to present final argument. This assertion is patently false insofar as the Petition for Appeal directly cites *State v. Webster*, 218 W.Va. 173, 624 S.E.2d 520 (2005), and *State v. McLaughlin*, W.Va. 229, 700 S.E.2d 289 (2010), to substantiate its assertion of error.

This Court, most recently in *State v. McLaughlin*, 226 W.Va. 229, 700 S.E.2d 289 (2010) set forth the procedural aspects which should be applied with respect to the mercy phase of a murder trial. Nowhere in that opinion does this Court overrule its holding in *State v. Webster*, wherein the Court held that the Trial Court has the obligation to provide a Defendant with the opportunity to present oral argument. *State v. Webster*, 218 W.Va. 173, 624 S.E.2d 520 (2005).

F. WHETHER THE PETITIONER HERETO WAS DENIED HIS RIGHT TO A FAIR TRIAL BASED UPON THE CIRCUIT COURT'S DENIAL OF COUNSEL'S OBJECTION TO THE STATE'S PROPOSED INSTRUCTIONS

In Reply to the Response to Petition for Appeal regarding this issue, your Petitioner restates and relies upon his argument as presented in his Petition for Appeal.

G. WHETHER CIRCUIT COURT ERRED IN FAILING TO ADDRESS IMPROPER AND PREJUDICIAL STATEMENTS MADE BY THE PROSECUTING ATTORNEY TO THE JURY DURING CLOSING ARGUMENT.

In Reply to the Response to Petition for Appeal regarding this issue, your Petitioner restates and relies upon his argument as presented in his Petition for Appeal.

H. THE INDICTMENT RETURNED AGAINST THE PETITIONER WAS FATALLY DEFECTIVE INsofar AS THE SAME FAILED TO PROPERLY IDENTIFY THE ALLEGED VICTIM OF THE OFFENSE.

In Reply to the Response to Petition for Appeal regarding this issue, your Petitioner restates and relies upon his argument as presented in his Petition for Appeal.

I. WHETHER THE CUMULATIVE ERROR OCCURING DURING THE PETITIONER'S TRIAL PROCEEDINGS REQUIRES A REVERSAL OF HIS CONVICTION UPON THE CHARGE OF MURDER, IN THE FIRST DEGREE, AND HIS SENTENCE OF LIFE

IMPRISONMENT WITHOUT MERCY.

In Reply to the Response to Petition for Appeal regarding this issue, your Petitioner restates and relies upon his argument as presented in his Petition for Appeal.

J. WHETHER THE EVIDENCE ADDUCED AT THE PETITIONER'S TRIAL WAS SUFFICIENT TO SUPPORT HIS CONVICTION SHOULD REQUIRE A REVERSAL OF THE PETITIONER'S CONVICTION UPON THE CHARGE OF MURDER, IN THE FIRST DEGREE, AND HIS SENTENCE TO LIFE IMPRISONMENT WITHOUT MERCY.

In Reply to the Response to Petition for Appeal regarding this issue, your Petitioner restates and relies upon its argument as presented in his Petition for Appeal.

CONCLUSION

For the foregoing reasons, the Petitioner's prayer for relief should be granted.

ARNOLD WAYNE MCCARTNEY,
PETITIONER,
By Counsel,



Dennis J. Willett, Esq.
Nanners & Willett, L.C.
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048
WV Bar No. 7095

Steven B. Nanners, Esq.
Nanners & Willett, L.C.
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048
WV Bar No. 6358

CERTIFICATE OF SERVICE

I, Dennis J. Willett, do hereby certify that on this the 22nd day of April, 2011, I served the foregoing Reply Brief by hand delivering true copies thereof to:

Mr. Gary W. Morris, Esq.
Lewis County Prosecuting Attorney
Weston, WV 26452

Mr. Thomas W. Rodd
Assistant Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301



Dennis J. Willett