STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0716 (Wayne County 08-F-077)

Stephen Wilson, Defendant Below,
Petitioner

FILED
May 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Stephen Wilson, by counsel D. Adrian Hoosier II, appeals the Circuit Court of Wayne County's order entered September 28, 2010, sentencing him to serve consecutive terms of forty years for second degree murder and 120 years for first degree robbery. The State of West Virginia, by counsel Laura Young, has filed a response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on May 31, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On June 19, 2008, Mark McCalla, a Presbyterian minister, was at a shooting range on a federal park situate in Wayne County where he was shot one time in the head and died. Petitioner, his co-defendant Daniel Smith, and their vehicle with a New York license plate all matched descriptions given by a witness who was present prior to the shooting, including that one of the men had a "Mohawk" hairstyle. Petitioner had a "Mohawk" at the time. According to the State, petitioner and his co-defendant perpetrated the crimes of murder and robbery by taking the victim's guns following the murder.

On June 27, 2008, around 9:30 p.m., petitioner and his co-defendant were arrested in Columbus, Ohio, with a duffel bag containing a weapon belonging to the victim. Following the arrest, around 3:00 a.m. on June 28, prior to presentment to a judicial officer for his initial appearance, petitioner was interrogated for a lengthy period and confessed to the crime. Petitioner asked for a lawyer multiple times during the interrogation. As the circuit court later concluded, the

officers never complied with his requests. Petitioner confessed in the statement that he shot the victim at the shooting range after the victim touched their weapons. Petitioner was indicted by the grand jury for one count of first degree robbery and one count of first degree murder.

Following the trial of his co-defendant, petitioner moved for a change of venue, citing pre-trial publicity. The circuit court denied petitioner's motion to change venue. Petitioner renewed the motion for change of venue just prior to trial and the motion was again denied.

Petitioner also moved to suppress his confession. The circuit court made the following findings, inter alia, in regard to suppression: (1) while charged with murder and robbery and in custody, petitioner was interrogated; (2) petitioner did sign a Waiver of *Miranda* rights; (3) petitioner asked for an attorney numerous times but "officers refused to give the petitioner an attorney;"(4) petitioner's statement was taken in violation of his Fifth Amendment right against self-incrimination and the prompt presentment rule; (5) petitioner's statement was not involuntary *in fact* but was involuntary *in law*; and (6) the State proved by a preponderance of the evidence that the officers' conduct was not so egregious as to override petitioner's freewill and make the statement unreliable. As a result of these findings, the circuit court ruled that petitioner's statements could not be used by the State in its case in chief. However, the circuit court ruled that the statements were relevant and could be used to impeach petitioner if he chose to testify and his testimony was inconsistent with the inadmissible statement. Such use was limited to the impeachment of petitioner and no other witness. Petitioner objected to this ruling.

The jury convicted petitioner of first degree robbery and second degree murder. The circuit court sentenced petitioner to serve consecutive sentences of 120 years for first degree robbery and forty years for second degree murder.

Disproportionality

Petitioner argues that the circuit court's imposition of a 120-year term of imprisonment for first degree robbery constitutes a disproportionate sentence in violation of Article III, Section 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution. Petitioner argues that the circuit court erred in light of substantial mitigating factors, including that these offenses are petitioner's first felony convictions and he was only nineteen-years-old when the crimes were committed. Petitioner also asserts that he was remorseful. He argues that his sentence for first degree robbery shocks the conscience and must be overturned. The State responds that the sentences given by the circuit court were within the statutory limits of West Virginia Code § 61-2-12(a) and that petitioner does not assert that the sentence was based upon any impermissible factor. *See State v. Goodnight*, 169 W.Va. 366, 287 S.E. 2d 504 (1982). The State argues that the facts of this case fully justify the sentence imposed. Petitioner shot and killed the victim from behind, at a time when victim's hearing was muffled thereby rendering him essentially helpless against the attack, in order to steal his guns. The State contends that petitioner was convicted of two of the most serious felonies possible.

"'Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: "Penalties shall be proportioned to the character and degree of the offence."' Syllabus point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980)." Syl. Pt. 4, *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009). "'Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating the West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.' Syllabus point 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983)." Syl. Pt. 5, *Id.* After careful consideration of the arguments and the record, the Court finds no error in petitioner's sentencing.

Right to Testify

Petitioner next argues that he was denied the right to testify because of the circuit court's ruling that his confession was suppressed unless he testified contrary to the statements made in his confession. Petitioner argues that the right to testify on one's own behalf is a protected constitutional right and that he was not able to make his own decision as to whether to testify because the circuit court made the decision for him in the ruling on the motion to suppress.

The State notes that there was no prohibition or infringement upon petitioner's right to testify on his own behalf. The State argues that petitioner could have testified if he chose to do so, but that he made a strategic decision not to testify. The State argues that the circuit court's rulings on the motion to suppress were correct. West Virginia distinguishes between statements by a defendant which are "involuntary" and those which were obtained in contravention of procedural safeguards. The circuit court determined that in the present case, petitioner's statement was obtained in contravention of procedural safeguards, rather than being factually involuntary. A statement which is deemed involuntary is inadmissible at trial for any purpose. The State cites Syllabus point 4 of *State v. Goodmon*, 170 W.Va. 123, 290 S.E. 2d 260 (1981), in which the Court stated that "[w]here a person who has been accused of committing a crime makes a voluntary statement that is inadmissible as evidence in the State's case in chief because the statement was made after the accused had requested a lawyer, the statement may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement knowing that such prior voluntary statement is inadmissible as evidence in the State's case in chief." The State reasons that while every defendant has the right to testify in his or her own behalf, the defendant does not have the right to commit perjury. The Court finds no deprivation of petitioner's right to testify.

Right to Confront Co-Defendant

Petitioner next argues that the circuit court denied his right to confront an accuser as stated in the Sixth Amendment of the United States Constitution. Petitioner asserts that his constitutional right to confront witnesses against him was violated when he was denied the right to confront his

co-defendant who asserted his Fifth Amendment protections and refused to testify. "'Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.' Syllabus point 6, *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006)." Syl. Pt. 1, *State v. Waldron*, — S.E.2d — , 2012 WL 171326 (2012).

The State argues that neither side knew if co-defendant Daniel Smith would testify at petitioner's trial. The State called Smith in its case in chief and he asserted the Fifth Amendment and refused to testify. The circuit court noted that he had already been convicted and ordered him to answer; Smith refused. The State sought to have him declared an unavailable witness so that the State could use his statement in its case in chief. The circuit court found that the State could not introduce that statement as it would violate petitioner's rights under the Confrontation Clause. Accordingly, the petitioner's co-defendant provided no testimony against him by the State.

In fact, the defense also wanted Smith to testify or, in the alternative, wanted to use another out-of-court statement by Smith in which Smith indicated that he was the shooter. The defense called Smith who again refused to answer any questions. The circuit court held that the out-of-court statement made by Smith was admissible as an exception to the hearsay rule because the statement was against Smith's interests.

As a result of these rulings, the State argues that there was no violation of the Confrontation Clause because the circuit court ruled that Smith's statement to police could not be used by the State. The State argues that petitioner achieved the result that he sought because Smith's statement to the police was not allowed, but petitioner was allowed to use Smith's other out-of-court statement made in the context of a failed plea to form his defense that he was not the shooter and was an innocent bystander of Smith's acts. Under the facts and circumstances of the present case, this Court finds no violation of petitioner's right to confront the co-defendant. To the extent there may have been any error, petitioner invited same.

Change of Venue

Petitioner next argues that the circuit court erred in allowing the trial to take place in Wayne County despite excessive pre-trial publicity. " ' " 'To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.' Point 2, Syllabus, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946)." Syllabus Point 1, *State v. Sette*, 161 W.Va. 384, 242 S.E.2d 464 (1978).' Syl. pt. 1, *State v. Derr*, 192 W.Va.165, 451 S.E.2d 731 (1994)." Syl. Pt. 6, *State v. Satterfield*, 193 W.Va. 503, 457 S.E.2d 440 (1995).

Petitioner argues that the circuit court erred in denying his motion for change of venue due to widespread news coverage in Wayne County of the crime and the trial of his co-defendant which occurred four months before petitioner's trial. Petitioner argues that he was prejudiced by the publicity, which included references to his confession and that of the co-defendant.

The State argues that there was no abuse of discretion by the circuit court in denying the motion for change of venue. The standard for granting a change of venue in West Virginia is whether the prejudice against the defendant is so great that he cannot get a fair trial. It is not merely whether there was widespread publicity or that such publicity was prejudicial to the defendant. See *State v. Gangwer*, 169 W.Va. 177, 286 S.E. 2d 389 (1982). Further, the burden of proof for a change of venue is on the defendant. The State contends that the proper inquiry is not whether the community had heard about the case, but whether the jurors had such fixed opinions that they could not be impartial. In the present case, there was no error in denying the motion for change of venue as there was no showing that such prejudice and lack of impartiality was present. Further, the State argues that the circuit court allowed great latitude during *voir dire* and excused *sua sponte* any juror who indicated that he had been affected by the news coverage. There was no apparent difficulty in obtaining a qualified jury. The Court concludes that there was no abuse of discretion in denying the motion for change of venue.

The Court notes that petitioner raises two more issues. Petitioner argues that the "circuit court denied [petitioner] due process by allowing the State to return physical evidence to the family before it could be analyzed by [the] defense." Petitioner's abbreviated argument fails to even identify what type of evidence is at issue. The State argues that this assignment of error should be summarily denied due to petitioner's failure to identify which items he is referencing and failure to explain how he was prejudiced. The Court declines to further address this issue. The other assignment of error deals with an allegation that the circuit court improperly allowed the introduction of gruesome photographs. Petitioner does not identify which photographs he is referencing and the appendix record contains no photographs. The Court also declines to further address this assignment of error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh