STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 11-0818 (Braxton County 10-F-44)

Keith Cox, Defendant Below,
Petitioner

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Keith Cox, by counsel Daniel R. Grindo, appeals his conviction, by jury, of the crime of insurance fraud in the Circuit Court of Braxton County. By order entered April 18, 2011, petitioner was sentenced to a term of incarceration of one to ten years. The State, by counsel C. Casey Forbes, has filed its response.

This Court has considered the parties' briefs and the appendix record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix 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.

Petitioner was convicted of one count of submitting a fraudulent claim to an insurance company in violation of West Virginia Code § 33-41-11(a). On May 13, 2009, petitioner's 2008 Chevrolet Silverado was involved in an accident that caused significant damage to the vehicle, prior to his obtaining insurance on that vehilce. On May 16, 2009, petitioner and his wife obtained an automotive insurance policy from Geico Insurance Company ("Geico") on that same vehicle. Shortly thereafter, on May 31, 2009, petitioner's wife contacted Geico to submit a claim under the policy. Petitioner's wife claimed to have mistakenly pushed on the gas pedal instead of the brake, causing the truck to be backed into an obstruction on May 31, and did not mention the prior accident from May 13, 2009. After initiating the claims process, Geico received an anonymous telephone call concerning the accident, prompting Geico to initiate an investigation into the claim given the proximity in time between the initiation of the policy and the accident in question. Through this investigation, Geico found evidence that the damage to the vehicle that petitioner claimed took place on May 31, 2009, actually occurred prior to the initiation of the policy in question and advised petitioner and his wife to withdraw the claim because it was believed to be untruthful. Petitioner's wife withdrew the claim and criminal charges were eventually brought against both petitioner and his wife.

By order entered April 18, 2011, petitioner was sentenced to a term of incarceration of one to ten years and was also fined $5,000.00 for his insurance fraud conviction. It is from this order that petitioner appeals, alleging the following three assignments of error: (1) that the circuit court erred

in allowing the State to introduce into evidence the contents of a recorded statement without requiring the State to disclose the same; (2) that the evidence presented at trial was insufficient to support petitioner's conviction; and, (3) that the sentence imposed was disproportionate to the circumstances of the case. These assignments of error, as well as the State's responses, are addressed in turn below.

Petitioner first argues that the circuit court erred in allowing the State to introduce testimonial evidence as to the contents of a recording without requiring the State to disclose the recording itself. According to petitioner, during the investigation of his insurance claim, a Geico fraud investigator, Tom Ballard, recorded a conversation between himself and the petitioner. However, it was not until Mr. Ballard's testimony at trial that petitioner became aware of such a recording. Petitioner argues that although Mr. Ballard testified that he sent this recording to the investigating police officer, the officer testified that he never received the same. According to the petitioner, his counsel objected and requested that the recording be disclosed immediately and that Mr. Ballard's testimony be stricken. However, the circuit court overruled these objections because the State never possessed the recording and because petitioner could have requested the same from the National Insurance Crime Bureau by subpoena. Petitioner argues that he requested that the State produce any such recordings during discovery. Petitioner further argues that even if the State did not receive the recording, it still failed to exercise due diligence in determining if such a recorded statement existed. Because of the State's failure to disclose this statement, petitioner argues that he was denied the ability to cross-examine the witness, Mr. Ballard, as to the truth of the statement, and further that he was forced to testify to rebut the witness's veracity, which was an effectual denial of his Fifth Amendment right to remain silent. For these reasons, petitioner argues that he was severely prejudiced by the State's failure to disclose the statement, and the circuit court's failure to require disclosure or, alternatively, to exclude the testimony was clear error.

In response, the State argues that the circuit court did not err in allowing Mr. Ballard's testimony concerning the statement. To begin, the State argues that the West Virginia Rules of Evidence permit a witness to testify as to matters within his personal knowledge, and that the best evidence rule does not prevent such testimony. In short, Mr. Ballard was permitted to testify as to the recorded statement because it is undisputed that both he and the petitioner participated in the conversation at issue. Further, while Rule 16 of the West Virginia Rules of Criminal Procedure requires disclosure of any statement of a defendant, there is simply no evidence that the State ever had possession or knowledge of the statement that Geico recorded. The investigating officer testified that he requested and received Geico's file from Mr. Ballard, but that he did not receive any recording as a part of this file. The State argues that it is unreasonable to conclude that either the investigating officer or the prosecutor should have exercised more due diligence by requesting an additional piece of evidence from Geico that was either never included in the file or was lost in transit, particularly since the State had no reason to know that such omission or loss occurred. Lastly, the State argues that petitioner was not compelled to testify in violation of his Fifth Amendment rights by any action on the part of the State. Upon review of the appendix, the Court agrees.

"'The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syllabus point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955),

overruled on other grounds by State ex rel. R.L. v. Bedell, 192 W.Va. 435, 452 S.E.2d 893 (1994)." Syl. Pt. 2, *State v. Doonan*, 220 W.Va. 8, 640 S.E.2d 71 (2006). It is clear that the circuit court did not abuse its discretion in allowing Mr. Ballard to testify as to his conversation with petitioner that he recorded. West Virginia Rule of Evidence 602 allows a witness to testify to any matter of which he or she has personal knowledge. The alleged failure to disclose has no bearing on the appropriateness of Mr. Ballard testifying as to his personal knowledge of the conversation at issue. The Court further finds no merit in petitioner's argument that the testimony should have been excluded pursuant to the best evidence rule. We have previously held that "[t]he best evidence rule does not preclude a witness from testifying to the facts recorded in a writing from his personal knowledge." *State v. Brown*, 177 W.Va. 633, 641, 355 S.E.2d 614, 622 (1987) (citing Cleckley, *Handbook on Evidence for West Virginia Lawyers* 582 (2d ed. 1986)). Based upon this prior holding, it is clear that the circuit court was correct to allow Mr. Ballard's testimony as to a conversation of which he was undeniably a part.

Further, the circuit court did not err in failing to require the State to disclose the recorded statement that Mr. Ballard made of this conversation because there was no evidence to show that the recording was ever in the possession of either the investigating officer or the prosecutor. As noted above, the West Virginia Rules of Criminal Procedure requires the State to disclose statements of a defendant. However, Rule 16(a)(1)(A) states, in relevant part, as follows:

> Upon request of a defendant the state must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state . . .

Accordingly, we find no error in the circuit court's ruling as to an alleged failure to disclose the recorded statement. A review of the appendix shows that the State neither knew of the recording, nor did it fail to exercise the due diligence required. The appendix shows that the investigating officer requested and received the investigatory file from Geico, which did not contain any recorded statement or even a transcript of such statement. For this reason, the Court finds that the State exercised the appropriate due diligence in obtaining the relevant investigatory file and had no duty disclose a recording that it neither possessed nor even knew existed. Because we find no error in the circuit court's decision regarding the admissibility of Mr. Ballard's testimony or its decision regarding the non-disclosure of the recorded statement, we find no merit in petitioner's argument that such non-disclosure effectively denied him his Fifth Amendment right to not testify in this matter. As such, we will not address this particular argument herein.

As to petitioner's second assignment of error, he argues that the evidence presented at trial was insufficient to support his conviction because the evidence indicated that he had a valid insurance policy and that it was proper for him to file a claim on the accident that he alleges occurred on May 31, 2009. In short, petitioner argues that the difference of opinion as to prior damage to his vehicle arose from statements made during the recorded conversation addressed above, wherein he was alleged to have stated that the vehicle had no significant damage prior to the accident that he alleges happened on May 31, 2009. However, petitioner argues that his testimony refutes that alleged

statement, and further that the best evidence rule dictates that the recorded statement should have been introduced to clarify the statements. As such, petitioner argues that the jury had insufficient and improper evidence before it upon which to base its verdict. Further, he argues that the allegation that he made improper statements to Geico insurance adjuster Grover Brown on June 4, 2009, is inconsistent with the date of the alleged criminal conduct in the indictment. Petitioner adds that the State's own witnesses admitted that it was perfectly proper for petitioner to have filed a claim.

In response, the State argues that several witnesses were presented to prove petitioner's guilt beyond a reasonable doubt. Mr. Brown, the Geico insurance adjuster, testified that when he examined petitioner's vehicle on June 4, 2009, the damage had begun to rust, which was uncommon given that the accident supposedly occurred only a few days prior. According to the State, Mr. Brown further testified that because the vehicle was a total loss, the cost of the claim was $22,000.00. Tow truck operator Clifford Nettles also testified to having towed petitioner's vehicle twice in May of 2009. The State also argues that on May 13, 2009, prior to the initiation of the Geico policy, Mr. Nettles was called to tow petitioner's vehicle out of a creek and place it in petitioner's garage. Mr. Nettles testified as to the damage caused to the vehicle on that day and further testified that the truck appeared to be in the same condition when the petitioner called him to tow the truck again from the same creek on or about May 31, 2009. According to the State, Mr. Ballard testified that during his investigation, petitioner failed to inform him about the accident in early May of 2009.

The State notes that Mr. Ballard testified to his belief that the claim submitted on the vehicle was not truthful. Based upon this assessment, Mr. Ballard advised petitioner and his wife to withdraw the claim, which petitioner's wife eventually did. Petitioner also testified and admitted that he knew he had an insurance policy on the vehicle and that he had picked up the rental car after the claim was submitted. Based upon petitioner's testimony, the State argues that petitioner knew the truck had been wrecked prior to the initiation of the policy in question and failed to disclose this fact to Mr. Ballard. Therefore, according to the State, the evidence below sufficiently proved beyond a reasonable doubt that petitioner and his wife submitted a fraudulent claim for insurance proceeds. The Court agrees. We have previously held as follows:

> "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, *State v. Malfregeot*, 224 W.Va. 264, 685 S.E.2d 237 (2009).

West Virginia Code § 33-41-11(a) states, in relevant part, as follows: "[a]ny person who knowingly and willfully and with intent to defraud submits a materially false statement in support of a claim for insurance benefits or payment pursuant to a policy of insurance or who conspires to do so is guilty of a crime . . . ." The jury was presented with testimony from the tow truck operator establishing that the truck in question was severely damaged prior to the initiation of the Geico policy on May 16, 2009. Contrary to petitioner's testimony that the truck did not suffer any significant damage prior to the initiation of the policy, the tow truck operator testified that when he towed it from a creek in early May of 2009, that "the tailgate and the bed was [sic] almost pushed clear up into the back of the cab. It was . . . hurt bad [sic]; bowed up in the middle." The tow truck operator further testified that the truck was in the same condition, and even in the same creek, when he was again called to tow it on or about May 31, 2009. While it is true that petitioner testified that the damage sustained during the first accident in May was minimal, the jury was the proper entity tasked with assessing the credibility of this conflicting testimony. We have previously held that "'[t]he jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.' Syl. Pt. 2, *State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967)." Syl. Pt. 2, *State v. Martin*, 224 W.Va. 577, 687 S.E.2d 360 (2009). Based upon the testimony summarized above and upon a review of the appendix, it is clear that the jury found the State's witnesses to be credible.

Further, petitioner's own testimony established that he knew his wife had purchased insurance on the vehicle and that she had submitted a claim related to the damaged vehicle. While petitioner argues that the evidence established that he committed no wrongdoing until June 4, 2009, and that this date is inconsistent with the crime charged in the indictment, the Court disagrees. The indictment clearly states that petitioner and his wife, "acting in concert, committed the offense of [insurance fraud], in that they . . . conspire[d] to submit, and did submit, materially false statements to agents of Geico General Insurance Company . . ." on or about May 31, 2009. Petitioner's argument on this issue mischaracterizes the nature of his crime. Providing untruthful statements to the investigator after petitioner filed his claim was not the alleged criminal conduct, though it was in furtherance of the conspiracy between petitioner and his wife. The criminal conduct occurred when petitioner's wife submitted the claim on the vehicle, with petitioner's knowledge, despite the fact that the damage to the vehicle occurred prior to the initiation of the policy in question. Based upon this evidence, it is clear that the jury was within its discretion to convict petitioner for the crime of insurance fraud.

As to petitioner's final assignment of error, he argues that the sentence received is disproportionate to the circumstances of the case. While he admits that his sentence is well within the statutory guidelines, petitioner argues that it is overly harsh given the allegations against him. Petitioner argues that even viewing the facts in a light most favorable to the State, the only thing he is guilty of is filing a claim and then withdrawing it prior to any determination of the value of the claim or prior to any insurance proceeds being paid. For the circuit court to sentence him to the most severe punishment available under the statute when no party was harmed is grossly disproportionate to the crime and shocks the conscience, according to petitioner. In response, the State argues that petitioner's sentence is not subject to appellate review because it is within statutory guidelines and not based upon an impermissible factor. According to the State, when sentencing petitioner, the circuit court considered the underlying offense, including the amount payable on the fraudulent

claim, the pre-sentence report, and petitioner's extensive criminal history dating back to 1974, including felonious assault, sexual assault, DUI, and battery. For these reasons, the State argues that the sentence imposed is not disproportionate and does not shock the conscience. The Court agrees.

"'Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.' Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. Pt. 3, *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010). West Virginia Code § 33-41-11(b) states, in relevant part, as follows: "[a]ny person who commits a violation of the provisions of subsection (a) of this section where the benefit sought is one thousand dollars or more in value is guilty of a felony and, upon conviction thereof, shall be imprisoned in a correctional facility for not less than one nor more than ten years, fined not more than ten thousand dollars, or both . . . ." As outlined above, the evidence was sufficient to support petitioner's conviction under West Virginia Code § 33-41-11(a). Further, Geico insurance adjuster Grover Brown testified that the value of the claim was approximately $22,000.00, which is well over the felony value threshold. As such, it is clear that petitioner was guilty of a felony count of insurance fraud and was sentenced within statutory guidelines. The Court notes that petitioner was fined only $5,000.00, which is only half of the total fine that the circuit court could have imposed. For these reasons, we decline to disturb petitioner's sentence on appeal.

For the foregoing reasons, we affirm the circuit court's sentencing order.

Affirmed.

ISSUED: May 29, 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